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TREATISE

ON THE

1889

LAW OF MARINE INSURANCE

AND

GENERAL AVERAGE.

BY

THEOPHILUS PARSONS, LL.D.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AT CAMBRIDGE.

IN TWO VOLUMES.

VOL. I.

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## P R E F A C E .

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OF my treatise on Maritime Law, the first volume contained the Law of Shipping. The second volume contained the Law of Marine Insurance, and the Law of Admiralty. In preparing a new edition of this work, I found that the recent cases on the subject of Marine Insurance, and especially those on General Average in connection with Insurance, in England and in this country, from their number, their interest, and their effect upon those important branches of Commercial Law, made it impossible to confine the work within its former limits. I determined, therefore, after much consultation with persons in different parts of our country whose opinions on such a question would be most valuable, to prepare a new work on the Law of Marine Insurance, founding it upon my former work, but so increasing its size as to enable me to make it as complete as I could. The result is the book now offered the public.

I have adhered in this work to the method which I have heretofore pursued; that is, in my text I have stated the principles of law, giving cases only where I thought I could present or illustrate those principles better by their help than otherwise, while in my notes I have referred to every case bearing with any force upon the statements in the text, and have given full abstracts of, or copious extracts from, the leading authorities. I began writing upon this system many years ago, in

the belief that the immense increase in the Reports made it difficult for any lawyers, and impossible for most, to have a Law Library approaching completeness; and this is now far more the case than it was then. I thought a book would be useful which, by a full and accurate reference to all important authorities, would enable any lawyer to find in the books he possessed whatever would be useful to him upon the question he was examining; while to those who were within reach of a complete library it would point out the way to a thorough investigation; and to those to whom few books were accessible, or who had not then the time to examine them, it would not only give the best conclusions to which a study of the question had led me, but, upon the most important questions, the very words in which different courts had stated the law.

This method I have pursued through many years and in many books; and the reception of them by the profession, while it calls for my grateful acknowledgments, justifies my hope that the method has been satisfactory, and my books useful. While I cannot hope that I have made no mistakes and no omissions, I venture to believe that no pains have been spared to make this book the exponent of the latest law, and as full and accurate a presentation of the authorities as the most thorough examination of a complete library could enable me to make. And I indulge myself with mentioning particularly the faithful and intelligent industry and valuable aid of Mr. J. A. L. WHITTIER of Maine, now Librarian of this Law School.

THEOPHILUS PARSONS.

DANE HALL, *Cambridge*, August, 1868.

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# THE LAW OF MARINE INSURANCE.

VOL. I.



# THE LAW OF MARINE INSURANCE.

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## CHAPTER I.

### THE HISTORY, NATURE, PURPOSE, AND EFFECT OF INSURANCE.

EMINENT writers on the Law of Insurance have sometimes ventured, not the assertion, but the conjecture, that insurance was known to the Romans, and possibly even to the Greeks. We have never seen any reason for this conjecture. Mr. Duer prefaces his valuable treatise on this subject by an elaborate argument in favor of this hypothesis. But the whole argument amounts to this: First, their commerce was so extensive, and the perils of their navigation so great, as almost to require, and therefore to imply, the practice of insurance. Secondly, the emperors, who imported large cargoes of corn from Africa and elsewhere, to feed and quiet the hungry and tumultuous multitude that filled their great city, probably bore the loss when the cargoes, by reason of wreck or piracy, failed to arrive. Thirdly, the contracts of bottomry and respondentia were well known, in frequent use, and guided by full and minute legal provisions, under the titles "De nautico fœnore" and "De usuris."

The first of these reasons has little or no force. Whatever may be our estimate of the value and effect of insurance, and whatever our belief that the existing commerce of Europe and America would not be practicable but for the safeguard of insurance, it is certainly unreasonable to assert that the very restricted commerce of those early ages could not have existed without it. Indeed the argument against the practice of insurance, on the ground that if that practice had prevailed the commerce of that vast empire would have been much larger,

seems to us quite as good as the argument that its actual extent implies the practice of insurance. The decisive argument against any existence of insurance in those ages is to be found in the fact that the Roman civil law, which, in its systematic completeness, neglected none of the affairs or transactions of life, is perfectly silent in reference to insurance. We have already said that contracts of bottomry and respondentia were carefully and minutely regulated. It was of the essence of those contracts that, if money was borrowed on the security of ships or cargoes, the lender was permitted to require, and the borrower permitted to contract for, a far larger interest than would otherwise be allowed, provided it was a part of the contract that, if the ship or cargo was lost by a peril of the sea, the lender should make no demand on the borrower for any part of the debt, principal or interest. Here the lender takes upon himself the risk of the loss of the property, and is paid for this risk by the increased interest. It is so far of the nature of insurance. It would seem impossible that contracts of this kind should be recognized as frequent in practice, and regulated by careful provisions of law, and yet that the contract of direct insurance should also exist in practice, and be wholly passed over and ignored by the law.

It is equally impossible to believe that such a practice as that of maritime insurance should ever exist, and pass wholly away, not only out of use, but out of knowledge. But there are no traces of it in the centuries of the decline and destruction of the Roman empire, until we come far down in mediæval ages. Nor can we doubt that the common impression is just, which regards insurance as an invention of merchants and ship-owners engaged in the commerce of the Mediterranean, somewhere in the twelfth century.

Almost contemporary with this invention, and made by persons engaged in the same commerce, was that other invention of negotiable bills of exchange. Nor is it too much to say, that these two inventions have made possible the enormous and growing commerce of this age. In another work I have considered more fully than would here be proper the effect of this last invention as an instrument of commerce. Here it is enough to say, that the commerce of earlier ages had been made possible by the invention of coined money, which thus became the representative of all

value, and was itself a medium of exchange of all property. In those distant ages when money was unknown, barter was necessarily the only means of commerce, and it imposed upon this commerce the narrowest limitations. But when money was invented, — a substance which occupied a comparatively small space, and was movable with great ease, — it opened these limits at once, and made an extensive commerce possible. And it may perhaps be supposed that the commerce of the ancient world attained all the development and magnitude which were possible, when all goods sold must be paid for with money, and vast amounts of this instrument of exchange must be kept on hand, or shifted from place to place, as the necessities of commerce required. But these limits, wide as they were in comparison with the narrow possibilities of a commerce by mere barter, — if indeed that should be called commerce, — were again widened, and in far greater proportion, by the invention and use of negotiable paper. For this was a method of coining credit. And the strips of paper which thus bore the whole accumulated credit of all whose names were on them became at once the representative of money, or the representative of that which was itself the representative of all value. By this means the value of the largest cargo might be transmitted across the world, within the envelope of a letter, and this in a form secured from loss by accident or design. A brief consideration of the extent of the present commerce of the world, within nearly all civilized nations, and between all nations, and of the method in which this is carried on, will make it obvious that if all use of negotiable paper were taken away, this commerce would be simply impossible.

It is not difficult to account for the introduction into commerce, at this time, of the use of negotiable paper, and also of insurance. The commerce of Christendom had reached all of its development which was possible without them. At this period there was one of those impulses to greater intensity and enlargement of human activity which appear at distant intervals through all the past. We need only refer to the press, the compass, to the revival of art and literature, to the voyages of discovery which led Columbus to America and Vasco da Gama to India by the Cape of Good Hope, and to the introduction of gunpowder, which has changed the character of war, and with it the relations of nations. It



more concerns our present subject, that commerce felt the same impulse; and if, on the one hand, the use of negotiable paper became one of the means of its rapid and great growth, the introduction of marine insurance was another. And it is easy to see how this has always operated, and still operates, to aid and promote extensive commerce.

The fundamental idea of insurance is to divide losses among numbers, so that they may fall with crushing weight on none; and at the same time do this with so little call upon the profits of commerce as to leave unimpaired its power of making men wealthy, and its inducement to men to engage in it for the purpose of becoming wealthy. And it is equally easy to see how it does this. It permits the small capitalist, and even him who begins only with borrowed capital, to engage in enterprises with the certainty of having its profits if it be successful, and without the danger of destruction if it end in disaster. The stimulus thus given to commerce can hardly be over-estimated. And it is also to be remembered, that the man of moderate means who sustains great and total loss without insurance is deprived of the means of business, and is no longer a merchant or sustainer of commerce.

Thus it is that the commerce of to-day, with the nearly universal practice of insurance, introduces a kind of solidarity among merchants. They become, to a certain extent, liable for each other, and so far protectors of each other. Nor is this true only of those who are neighbors, or who live in the same region of country. The maritime property of any one of our commercial cities is divided to a considerable extent, as to its insurance, among all the cities. And not only so, but American property is insured in England, and English property in this country. And the same thing is true, although to a less extent, of the Continent of Europe.

This subject has been dwelt upon, not merely for whatever interest it may have to the student of history as an historical inquiry, but for its direct and important bearing upon the law of insurance.

If we understand the immense utility of insurance, and the grounds, or, as may well be said, the indispensable conditions of this utility, we shall see that these depend upon a few simple

principles ; and we shall also see that merchants in their practice, and courts in their decisions of the multifarious and complicated questions presented by the law of insurance, constantly regard these principles. And it may be added, that if the sagacity of merchants, stimulated by a sense of direct interest, and gradually taught by experience, has discovered these principles and applied them to practice, it is not less true that courts have been too sagacious to disregard this practice. Since the days of Lord Mansfield, who set a wise example in this respect, the jurisprudence of England and America, in the matter of insurance, has done little else than adopt the usage of merchants, and give to it the force of authority.

What are these principles? They are few and easily stated. And indeed they all rest on one principle. It is, that if insurance be made too costly to the insured, and if it be too difficult for them to obtain indemnity for loss by reason of the narrow construction of the law, or the severe application of technical requirements, the practice of insurance would be checked, and it would be left very much to the wealthiest and the most careful merchants, who are those that need it least, and who would be most disposed — to use a common phrase — to “stand as their own insurers.”

On the other hand, if insurance be too cheap, and, when loss occurs, indemnity is so easily recovered as to put the careless and the careful on the same ground, insurers would find themselves losing too much, or, in other words, losing on the whole ; and if the business of insurance were conducted on the credit of funds appropriated to it, they would fail, and insurance become in fact no insurance. Or, if to meet these expenses and losses, they raised their premiums high enough to cover them, careful and skilful merchants would avoid insurance when the risks they had to pay for were far greater than the actual risks to which their own property was exposed.

The object, therefore, to be attained by merchants and insurers in their usages, and by courts in their construction of the laws of insurance, and in the application of them to cases which come before them, is to find if possible the just medium between these extremes.

The ideal perfection of maritime insurance is easily stated. It

would become actual, if all maritime property were covered by insurance, and the risks of this insurance were widely distributed, and the cost of it were so accurately proportioned to the real danger that the premiums sufficed to pay all the losses, with only a sufficient surplus to pay the expense of the business when economically conducted, and a reasonable interest on the funds on the security whereof the insurance is effected.

This ideal may never be attained and preserved with precise accuracy; but the departures from it oscillate within narrow limits, and, on the whole, the work is sufficiently well done. At one time premiums run a little too high. Then the business is checked. The best ship-owners and merchants decline to pay more than they think the risk is worth, and insurers are obliged to call them back by lowering the rate of premiums. At another time the premiums run too low: in their desire to do much business, and in the competition for business, insurers take risks at less than they are really worth. The consequence soon shows itself. Losses eat up all the premiums, and something more; and insurers find that the more business they do in that way, the worse it is for them. The mischief cures itself at once. As soon as such a state of things is seen to exist, or rather, as soon as it is seen to threaten, insurers raise their premiums; and, with some check to their business perhaps, conduct it on terms which give them a reasonable profit, and afford security to the insured at reasonable cost. And so it goes on. These fluctuations are inevitable. No law could prevent them, nor could it usefully interfere with them. The necessities of business, and the certain consequences of error in either direction, suffice to keep these alternations within narrow bounds; and the business of insurance, in submitting to them, only follows the universal law of all human actions, and indeed of the movements of the world. Everywhere, nothing is perfectly and permanently right; but aberration in one direction is cured and compensated by aberration in another, and the resultant of the whole is near enough to the right to be practically sufficient.

All this grows out of, and depends upon, the great law of average. Insurance of all kinds rests on this foundation more obviously than anything else. But it is a law, or a fact, of vast and wide power. Only of late years has it become the subject of

scientific investigation ; nor is it now, in some of its relations, well understood ; but it is found to be in universal operation. It may be stated simply as the rule, that irregularities of all kinds tend to compensate for each other. Wherever there is a law, there are exceptions to it ; and these exceptions seem to be lawless ; but it is not quite so. They are connected together by a kind of law among themselves, which, in the end, and viewing them in the mass, subjects the exceptions themselves to rule and measure and calculation. This law, not yet well understood, is nevertheless distinctly perceived. We find it wherever we look for it. We know not what the temperature or weather of any day may be ; but the months of one year differ from the corresponding months of another year within far narrower limits ; and a whole year differs from any other still less ; and thus the *average* rainfall, heat, or cold of any place is determinable ; and the variation from it in different years is very slight in comparison with the difference from day to day. In a great city like London there is a marvellous uniformity, year by year, not only in the gross number of letters mailed, but in the several exceptions which would seem to be purely casual ; the percentage of letters unsealed, not directed, or illegibly directed, or not delivered because addressed to persons who cannot be found, being very nearly the same in every year. So it is with crimes, with accidents, with diseases, with life and death.

It has been already said, that this law is not yet well understood ; but its universality compels its recognition. And it is difficult to believe that this uniformity in accidents and exceptions, as in the weather of a long period, in the London letters, in diseases and births and deaths, and in the fact now asserted by science, that while every planet moves abnormally, and affects every other irregularly, these abnormalities do so exactly compensate each other as to give stability to the system, — it is difficult to believe that these and all facts of like kind are not governed by some underlying and all-embracing principle.

This law is applied to the business of insurance, and becomes indeed its foundation, in this way. If a ship sails from New York for Calcutta, it would be impossible to predict with any certainty whether she would ever return, or what or where would be the cause of her loss, if she did not return. Take ten ships, and there

arises some probability as to all of them. Take a hundred, and this probability becomes far greater. Take a thousand, and this probability becomes a rule. And if we could take the whole commerce of this country, we should find this rule cognizable, definite, and entirely trustworthy.

A consequence of vast practical importance to the business of insurance is this: the greater the extent of the business, or the greater the number of risks insured, or, in yet other words, the greater the mass of risks on which the rate of insurance is calculated, the safer and more trustworthy is that calculation.

It follows, obviously, that the rules and methods of insurance should be so adjusted, and so construed, as to give the greatest possible enlargement to the business. And I have ventured to dwell at some length on these principles, because they have had a most important influence upon the laws and practice of insurance.

Take, for example, the great subject of sea-worthiness, which must occupy many pages in this work, and in regard to which the cases are very numerous. The general rule is, that a ship must be sea-worthy; and this is a condition precedent, without which the policy does not attach. Then the general meaning of sea-worthiness is a fitness to encounter safely the ordinary perils of the voyage, or the time, for which the ship is insured. Now, when a loss occurs, and brings up this question of unseaworthiness, it is plain that the decision may be erroneous in either of two ways. Let us first suppose that it is too liberal, or lax, in favor of the insured. What would be the tendency of such a decision, or of many such, if they became numerous enough to constitute a rule? Such a rule would, of course, favor the careless, if not the fraudulent ship-owner. A vessel so far weakened by age or previous misfortune, or so imperfectly manned or provided with the necessary equipment, that she is not sea-worthy in any just sense of the word, goes to sea because she can be insured, and imperils her cargo and her crew. A ship which has done her work, and ought to be broken up, goes on still, with the purpose, or the hope perhaps, of the owners, to "sell her to the underwriters," to use a common phrase. Now it is obvious that insurers must be paid for their risks. Premiums are not specifically adjusted to each case, except in some slight degree. They must, on the large scale, be founded upon general rules and estimates. And any such unfit

vessels as enter into the business of insurance must have some effect in raising the premiums. Then it will follow that the tendency of this rise is to keep out of insurance the most careful ship-owners. Such men will feel that the price demanded is more than is required to cover the risk of a vessel so strong and well found as their vessels are. Just this process of reasoning may not be gone through; but the *tendency* of this course is obviously in this direction, and cannot but produce some effect. And as the vessels which can be safely insured on low premiums are withdrawn from insurance, the general estimate or calculation must be founded in a still larger measure upon poorer risks; and therefore the rates of premium become still higher, and the effect goes on increasing.

But now let us suppose that the decisions, and the rules and practice founded upon them, are too severe and stringent, and protect insurers from liability for some deficiency or defect which, while it places the vessel low in the scale, would not suffice to brand her as unseaworthy, if that word received a just and rational construction. Such a course of construction would exclude from insurance many vessels which might still be usefully employed, and insured on fair terms, with safety; and vessels excluded from insurance can hardly continue to be instruments of commerce. Such a course of decisions would favor the best class of ship-owners; for it would found the rate of premiums on the safest risks, and thus bring it so low as to make it their interest to be insured. But it would do this at the cost of the lower and poorer classes; and the exclusion of their vessels from insurance would not only narrow the beneficial reach of the practice of insurance, but diminish the number of cases taken into consideration in estimating the value of the risk, and thus diminish the certainty and regularity of the business, by diminishing the basis on which the *average* is founded.

Where, then, is the exact medium? It is impossible to answer this question by a positive rule or a precise definition. When we treat, in subsequent pages, of the subject of sea-worthiness, and consider the authorities which relate to it, it will be seen that there is much fluctuation and uncertainty in the cases. But it will also be seen, if we mistake not, that there is a constant effort, as well by merchants in their usages as by courts in the construction

and application of law, to find a just medium, and stand upon it; and any argument founded upon the acknowledged necessity of avoiding equally the extreme of laxity or that of severity has great weight, and the practical conclusion to which it seems to lead is generally adopted.

Many similar remarks might be made in reference to the great topics of general average, and of constructive total loss and abandonment. And it will be seen that in some instances courts, for a certain period, have gone in a direction which favors one of the parties to the contract of insurance at the expense of the other; and then that the disposition of courts, or their judgment of the expediency of such a course, has changed, and perhaps, for a time, a tendency to go to the opposite extreme is manifested. And nothing can be more certain than that the law of insurance, as a science and a system, will advance and improve in proportion as it reaches the just medium in all questions of this kind, and founds its conclusions upon principles which cover the whole ground, and from their reasonableness and moderation may hope for stability.

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The earliest distinct intimation of marine insurance effected in England is found in the papers recently published by Mr. Rawdon Brown, in a collection of Venetian state papers relating to trade with England. In one of them occurs a representation by a Venetian merchant, made in 1512, that insurances were effected in England on property from Candia, generally at a premium of ten per cent.<sup>1</sup> Guicciardini, in his History of Italy, published in 1561, speaks of an immense commerce as then existing between England and the Netherlands, and says that they have fallen into a way of insuring their merchandise from losses at sea by a joint contribution.<sup>2</sup> The business of marine insurance seems to have grown very rapidly in England. The statute of 43 Eliz. ch. 12 (1601), begins: "Whereas it hath been time out of mind an usage among merchants, both of this realm and of foreign nations,

<sup>1</sup> I am indebted for this fact, and for some others of much interest, in relation to the early history of marine insurance, to a work recently published in England by Mr. Manly Hopkins, entitled "A Manual of Marine Insurance."  
<sup>2</sup> Anderson's History of Commerce, p. 109.



when they make any great adventure (especially into remote parts), to give some consideration of money to other persons, which commonly are in no small number, to have from them assurance made of their goods, merchandises, ships, and things adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly called a policy of assurance, by means of which it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon those that adventure not than upon those that adventure; whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely," &c. After this brief but very clear statement of the principles of and the reasons for insurance, the statute goes on to say that few controversies have arisen, and these have been settled by "certain grave and discreet merchants appointed by the Lord Mayor of London"; but that of late suits had been brought in courts of law, and then the statute provides that, "for the determining of causes on policies of insurance," a standing commission shall be appointed yearly by the Lord Chancellor, to consist "of the Judge of the Admiralty, the Recorder of London, the doctors of the civil law, two common lawyers, and eight discreet merchants, or any five of them." The commission to determine all such questions, with an appeal to the Lord Chancellor by bill in Chancery. No commissioner to be either assurer or assured. This commission, or "court of policies of insurance," as it was sometimes called, continued a considerable time, but gradually fell into disuse; and Blackstone, writing something more than a century ago, said, "no such commission has of late years issued." And all questions under policies have been since then tried, as they now are, by the courts of law and equity.

It was not until 1720 that charters of incorporation were granted to the two companies which, under the names of "The London Assurance Company" and "The Royal Exchange Assurance Company," have ever since transacted, and still do transact, a large proportion of the insurance business of England. Mr. Marryatt, a member of the House of Commons, in a speech delivered there in 1810, says, "the existing companies [being the two



above mentioned] owe their establishment to a job." That is, they agreed to pay George I. the sum of £600,000 for their charter. But they never did pay more than half of this; their profits, which at first were, or were supposed to be, enormous, having gradually fallen off. Since then there have been repeated efforts to take from these companies their exclusive privileges, and open the business of insurance to competition. About forty years ago a new company was established, and soon after others; some of which maintained themselves successfully, while others failed. And now there are in London more than twenty proprietary marine-insurance companies, and a number of mutual ship-insurance associations.<sup>1</sup>

It is said that the bulk of the business of marine insurance of Great Britain is always done in London; but in the other large cities of England, Scotland, and Ireland there are some insurance companies or associations which have a considerable amount of local business. These associations are conducted mainly under an arrangement by which an agent is authorized by a number of persons to insure for them, and underwrite their names on the policies as their attorney.

The term "Lloyd's," now known all over the mercantile world, was about one hundred and fifty years ago the name of a coffee-house (so called from its proprietor), to which underwriters and merchants wishing to be insured resorted. This continued until the name became permanently attached to the house as a place of business; and the same name went with the business when those engaged in it, in 1774, established an office for its transaction in the Royal Exchange, where it is now. The subscribers to "Lloyd's" are now over fifteen hundred in number, about four hundred of whom are underwriters.<sup>2</sup> The amount of business done is enormous. It is said, mainly on the authority of Mr. Marryatt's speech, before referred to, that in 1810 insurance could be effected on a single ship and cargo to the amount of a million of dollars. At a later period it was stated in evidence before the House of Commons that more than three millions of dollars (£631,800) were insured at Lloyd's on specie on board the *Diana* frigate; £300,000 having been insured on specie on board the frigate *Luline*, and £400,000 on the *Althea* (an Indiaman) and

<sup>1</sup> Manley's Manual of Marine Insurance, p. 43.

<sup>2</sup> Ibid.

her cargo, and, both vessels being lost, this sum of three and a half millions of dollars was paid by the underwriters "with honor and promptitude." These large sums were, however, insured by a great number of underwriters; the two principal companies taking a large amount, and the residue being by individual underwriters, or "insurance circles," as they have been recently called. In 1810 it was estimated that the insurable interests, in ships, goods, and freight, of British imports and exports, amounted annually to about sixteen hundred millions of dollars, and that rather more than half of this amount was under insurance.

When we read of the very high premiums paid for insurance in early ages (ten per cent being the common rate), and find that this rate declined only slowly to the present moderate percentage, two conclusions are suggested: one, that the dangers of a commerce which could induce those engaged in it to pay such rates must have been very great; and then, that the profits of this commerce must have been very great, to encounter such risks and losses, or pay such rates of insurance, and still flourish. We may, perhaps, form a still further conclusion; it is, that without the encouragement and support of insurance, as intimated so long ago as in the statute of Elizabeth above referred to, this commerce could not have endured its reverses, and grown and expanded as it did.

We close this chapter with an illustration of the beneficial working of insurance, from Manly's Manual, to which we have repeatedly referred. "A very fitting parallel to the underwriters' office in commerce may be taken from mechanics. The underwriter is a fly-wheel, which, gathering force from small and frequent impulses, discharges the accumulated power when and as it is required, and causes the machine to which it is an adjunct to act smoothly and continuously."

## CHAPTER II.

## OF THE MANNER OF INSURANCE.

SECTION I. — *Who are Insurers.*

IN the beginning of the business of marine insurance in this country, it was usually effected by policies to which individuals subscribed their names, each one being responsible for the sum set against his name, and no more. It was very common for some person to establish an office as insurance broker or agent. To this office merchants resorted who wished to insure others or to be insured. If one applied to the broker, stating the ship or cargo on which he desired insurance, and the voyage, or time, these were written at the head of a sheet which was laid upon the broker's table. Between him and the assured a premium was agreed upon, and this also was designated. Then one and another of those who were willing to insure such property on such terms wrote their names upon the sheet under the heading above mentioned, stating also the amount which they were willing to insure; and this continued until names enough were subscribed to fill out the whole amount which the insured desired to cover. This method was varied in different cases, and rules and usages grew up about it which were generally regarded, and, if sufficiently established, might have to some extent the force of law.

As each insurance was effected, or perhaps when the whole proposed amount was subscribed, premium notes were given to each subscriber, or sometimes to the holder of the office. And in one case, in Massachusetts, in 1814, in which the notes were signed, not by the party insured, but by his broker or factor for him, in the broker's own name, without any words indicating agency, it was held that the insured was not liable in an action *on the note*.<sup>1</sup>

<sup>1</sup> *Stackpole v. Arnold*, 11 Mass. 27. request and for the use of the defendant, The notes upon which the action was on property belonging to him; the firm brought were given for premiums upon of which the factor was a member had policies of insurance procured by the done business for the defendant; the factor in the office of the plaintiff, at the policies were effected by them in pur-

This method of effecting insurance was adopted from England, where it existed at the beginning of marine insurance, and is still practised to a considerable extent. From it grew the usage of the word "underwriter" (which is, of course, the same in its meaning as "subscriber," the one word being formed from Saxon roots and the other from Latin roots) in the exclusive sense of insurer, and as exactly synonymous with insurer.

But this method is now seldom practised in this country. About the beginning of this century incorporated stock companies for marine insurance were introduced, the earliest in Massachusetts being in 1799. They multiplied rapidly, more than twenty being incorporated in that State in the succeeding six years; and they gradually absorbed the business of insurance, superseding the early method of insurance by individuals. Some

suance of instructions from the defendant, who was advised of their having been effected, and made no objection thereto; the factor intended to bind the defendant by the premium notes, and had never charged the premium upon the policies in any account with the defendant. In giving the decision of the court, *Parker, J.*, said: "Neither is there any doubt that the letters signed by the defendant, and the policies of insurance made for his benefit, were properly admitted in evidence to show the authority of the witness to procure insurance for him; and it might have been legally inferred from this evidence, that the witness had sufficient authority to make the premium notes for the defendant, had he undertaken to charge him in the form of contract which he adopted. It is well settled, that written or parol authority is sufficient to authorize an act of this sort, without a formal letter of attorney under seal. But this written evidence proved nothing more than that the witness had authority to bind the defendant in this contract. Whether he had executed this authority or not, depended upon other facts, which were proved by

the oral testimony of the witness; and the question now is, whether the oral testimony given at the trial, tending to prove the intention of both parties to the contract, was properly received to control and alter the tenor and effect of the notes, so as to make them the notes of the defendant, instead of being the notes of the witness, as they purport to be upon the face of them. It might be sufficient for the decision of this cause to state that no person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature. It is also held that, whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person."

of the reasons of this are obvious. The stock capital gave a considerable security to the insured. The natural desire of companies to extend their business, and the influence of competition, brought down premiums lower than individuals were willing to accept. These companies went on with varying fortunes. The element of chance, or of what is so called, entered necessarily into their business; it could never be reduced to certainty, and was brought within the reach of probability and calculation only by that other element of average, of which we have already spoken; and by skill and watchfulness in deducing, from the instances and circumstances of safe voyages on the one hand and disastrous voyages on the other, the rules and estimates to be applied in practice. And while some of these companies, whether because better conducted or more fortunate, made large dividends and accumulated large reserves, others were less successful, and some were ruined.

Through all this, that is, in the earliest method of insurance by individuals, and the later method of insurance by incorporated companies, the principle of mutuality had an indirect, but still a considerable influence. The individual underwriters were frequently, perhaps generally, merchants who were themselves insured; and while they paid on the policies by which they were insured something more than the amount which would cover the actual risk, and were willing to do this to obtain the security from disastrous loss which insurance gave them, they then insured small amounts in various policies, at the same rate, to balance by their profits a part of the cost of insurance. So the stock companies were, at first altogether, and for a considerable time mainly, owned by merchants who were themselves insured, and who thus recovered in dividends the extra prices which they paid.

It was not long, however, before the large profits and apparent security of the stock companies made their shares desirable investments for all; and the proportion of stockholders who had retired from business or had never been merchants grew large. Then a kind of opposition of interest, or at all events a decided distinction of interests, grew up between those who paid and those who received the premiums; and merchants who sought insurance were less willing to pay what seemed to them a premium beyond the actual risk, because this extra cost came back to them in no way.

Out of all this grew the establishment (first in fire insurance

and afterwards in marine insurance) of mutual-insurance companies, so called. They are now numerous, and transact their business in a great variety of methods, perhaps no two of them having precisely the same system, and each endeavoring to attract business by offering to their customers more security or convenience or profits. But through them all runs one principle; which is, that, after deducting from all the premiums paid, all the losses, then a sufficient amount to provide for a proper reserve, and then enough to cover the expense of carrying on the business, the remainder is divided among those who paid the premiums, in proportion to their amount.

The earliest mutual companies had generally a stock capital. And then, before the profits were divided among the premium payers, enough was reserved to pay a certain dividend to the stockholders. This capital gave additional security to the insured, but diminished their profits. Some mutual companies have now this stock capital, and others have not. And the merchant chooses whether to give up a certain part of the profits for the additional security of the capital, or to trust to the security of the whole mass of the premiums.

While these mutual companies are numerous, they have not superseded the stock-capital companies. The customers of these last are those who prefer to the possible return of extra premiums the security derived from a paid capital. Nor is the difference so material as might be supposed. The competition for business has produced its natural consequence of bringing premiums of all kinds down, until, on the average, they are no more than sufficient to carry on the business with safety to all concerned; and, in the fluctuations which necessarily attend transactions of this kind, they are sometimes below that amount.

## SECTION II. — *Of those for whose Benefit the Contract of Insurance may be made.*

By the contract of marine insurance, the insurer, for a consideration which is called a premium, undertakes to indemnify the insured against loss on property arising from perils, the property and the perils being both defined by the instrument of agreement,

aided by the law.<sup>1</sup> Insurers are under no obligation to insure for all who offer, and it has been held that an action will not lie against them for combining to refuse to insure for a certain person, however malicious their motive may be.<sup>2</sup> But this question would depend somewhat, if the insurance sought to be effected was that of an incorporated company, upon the nature of its charter; which generally, however, only gives the power, but in no way compels the company to make insurance for all who offer.

The contract of insurance may be made, generally, by any parties competent to enter into any contract. The principal exception in practice is an alien enemy, in whose favor no contract of insurance can usually be enforced in our courts. An insurance for his benefit, or to cover any property or interest belonging to him, is void.<sup>3</sup> And it is the exclusive right of every govern-

<sup>1</sup> See Le Guidon, ch. 1, art. 1; Emerigon, ch. 1, Meredith's ed. 2; Roccus, Ingersoll's ed. 85.

<sup>2</sup> Hunt v. Simonds, 19 Mo. 583.

<sup>3</sup> The doctrine at one time prevailed in England, supported by the great authority of Lord *Mansfield*, that it was lawful to insure an enemy's property. *Planche v. Fletcher*, 1 Doug. 251; *Lavabre v. Wilson*, Id. 284; *The llusson v. Fergusson*, Id. 361; *Eden v. Parkison*, 2 Id. 732; *Bermon v. Woodbridge*, Id. 781; *Tyson v. Gurney*, 3 T. R. 447; *Henkle v. Royal Exch. Ass. Co.*, 1 Ves. Sen. 317; *Gist v. Mason*, 1 T. R. 84. It would seem, however, that the question of the legality of such insurances was never fairly met and decided by Lord *Mansfield*, as is shown by what fell from *Buller, J.*, in *Bell v. Gilson*, 1 B. & P. 345, 354. "When," says he, "the case of *Gist v. Mason* came on, I more than once conversed with Lord *Mansfield* on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said that in former times it was considered for the interest of the

country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience." It was supposed that the country would gain more by the payment of premiums to the insurers than it would lose by the payment of losses to the assured. The temporary acts of Parliament, applying only to existing wars, have made such insurances illegal. 21 Geo. 2, c. 4; 33 Geo. 3, c. 27, § 4. The courts of law, however, since the time of Lord *Mansfield*, have established by a long course of decisions the doctrine that all insurance of an enemy's property is illegal. The cases of *Brandon v. Nesbitt*, 6 T. R. 23, and *Bristow v. Towers*, Id. 35, decided that no action could be maintained on a policy of insurance by or in favor of an alien enemy. The question of the legality of such insurances, though raised and ably argued by counsel, especially in the latter case, was not decided by the court. The precise question was raised in *Furtado v. Rodgers*, 3 B. & P. 191, and such insurance



ment to determine who are its public enemies. And if a citizen's property which is within the territories of a foreign nation when that nation becomes a public enemy is brought from thence while

was held to be void because illegal. See also *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407. The case of *Brandon v. Curling*, 4 East, 410, must be regarded as extending the doctrine still further. In this case insurance was effected on goods shipped on board a neutral ship, on account, and at the risk of Frenchmen before war was declared between Great Britain and France. The goods were exported during the war, and were captured at sea by a co-belligerent, and Lord *Ellenborough*, C. J., laid down the rule, and the case was decided upon the ground, "that, where the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, namely, 'Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer.'" It may be laid down that every insurance of enemy's property entered into in time of war is absolutely void as illegal, and that the effect of a subsequent war is at least entirely to suspend the contract during the continuance of that war; and perhaps to completely avoid it. See *Griswold v. Waddington*, 15 Johns. 57, 16 Johns. 438; *The Hoop*, 1 Rob. Adm. 196, 201. See also *Le Guidon*, ch. 2, art. 5; *Emerigon*, ch. 4, sec. 9, *Meredith's* ed. 103; 2 *Valin*, liv. 3, tit. 6, art. 3; *Du Ponceau's Bynkershoek*, ch. 21. Where the assured becomes an alien enemy after the happening of a loss, the remedy is merely suspended during the existence of the war, and his right may be enforced upon the return of

peace. *Flindt v. Waters*, 15 East, 260. For exceptions to the rule that no contract with an alien enemy is valid, see, as to ransom bills, *Ricord v. Battenham*, 3 Burr. 1734; *Cornu v. Blackburne*, 2 Doug. 641; *Goodrich v. Gordon*, 15 Johns. 6; Per Chancellor *Kent*, *Griswold v. Waddington*, 16 Johns. 438, 451; Per Sir *William Scott*, *The Hoop*, 1 Rob. Adm. 196, 201; Per *Washington, J.*, in *Crawford v. The William Penn*, 3 Wash. C. C. 484, 492; and as to bills drawn in an enemy's country and indorsed to an alien enemy by and for the subsistence of a prisoner of war, *Antoine v. Morshead*, 6 Taunt. 237. The remedy, however, upon such contracts would be suspended during the continuance of a war. The actions in *Ricord v. Battenham* and *Cornu v. Blackburne* were brought in the names of the aliens. It is true that in the former case, as is said by Lord *Kenyon* in *Brandon v. Nesbitt*, 6 T. R. 23, the action was not brought until peace was restored, and the objection of the plaintiff being an alien enemy was thus got rid of; but the latter case was brought during the continuance of the war. There seems to be no reason why the general principle that trading with an enemy during the continuance of a war is illegal should not apply to the contract of insurance. Speaking of this principle, Mr. Justice *Story* said: "It has grown hoary under the reverent respect of centuries, and cannot now be shaken, without uprooting the very foundations of national law." *The Cargo of the Ship Emulous*, 1 Gallis. 563, 571. See also *Potts v. Bell*, 8 T. R. 548; *Willison v. Patteson*, 7 Taunt. 439.



the war continues, it is presumed to be a trading with the enemy,<sup>1</sup> unless he has ordered the goods before the war and had no means of countermanding the order afterwards.<sup>2</sup> But transactions with an enemy which are not voluntary, but the result of a strict necessity, are not illegal.<sup>3</sup> A hull has the national character of her flag,<sup>4</sup> but this does not determine the nationality of the cargo.<sup>5</sup>

<sup>1</sup> *The Hoop*, 1 Rob. Adm. 196; *The Elizabeth of Ostend*, cited 1 Rob. Adm. 202; *The Juffrow Louisa Margaretha*, cited 1 Rob. Adm. 203, 8 T. R. 557, 1 B. & P. 349, n.; *The St. Phillip*, cited 8 T. R. 556; *The Brig Mary*, 1 Gallis. 620; *The Rapid*, 1 Gallis. 295, 8 Cranch, 155; *The Ship St. Lawrence*, 1 Gallis. 467, 9 Cranch, 120; *The Alexander*, 8 Cranch, 169. See also *The Brig Joseph*, 1 Gallis. 545. In regard to the right of a citizen in a foreign country to remove his goods immediately after war breaks out, see *post*, p. 80, n. 3. The case of *The Madonna delle Gracie*, 4 Rob. Adm. 195, has been supposed to countenance the doctrine that, if a license might be obtained, it would be the same as if it had been, and the cargo would be protected. This has arisen from the following expression: "The circumstances of this case may be taken as virtually amounting to a license; inasmuch as, if a license had been applied for, it must have been granted." But this case was decided on its peculiar circumstances. The claimant was a British consul, who had not acted as a merchant, but had bought the cargo in question for the British government, to supply its fleets. It will be seen, therefore, that the case is not an authority to the point that a citizen may, after war has broken out, bring home his goods without a license.

<sup>2</sup> *The Juffrow Catharina*, 5 Rob. Adm. 140. In the case of *The Merimack*, 8 Cranch, 317, the goods were purchased by British merchants in Eng-

land, in pursuance of orders from American citizens, before the war between the United States and Great Britain commenced. After it broke out they were shipped to the agent of the British merchants in this country, who was an American citizen, "on account and risk of an American citizen." Held, that they were not liable to condemnation.

<sup>3</sup> *Jenks v. Hallet*, 1 Caines, 60; *Hallet v. Jenks*, 3 Cranch, 210, 1 Caines, Cas. 43. The action was upon a policy of insurance, on a vessel from Hispaniola to St. Thomas. The vessel, while on a voyage from Newport in Rhode Island to Havana, was compelled to put into Hispaniola, a country in the possession of France. The cargo was landed in order that the vessel might be repaired, and was prevented from being reloaded by the government. It was sold, and the cargo on board at the time of the seizure was bought with the proceeds. By an act of Congress passed June 13, 1798, all commercial intercourse between the United States and France, and the dependencies thereof, was prohibited. The vessel was captured by a British frigate, and the assured claimed as for a total loss. Held, that under the circumstances the voyage was not illegal so as to avoid the insurance.

<sup>4</sup> *The Vrow Elizabeth*, 5 Rob. Adm. 2; *The Primus*, Eng. Adm. 1854, 29 Eng. L. & Eq. 589; *The Industrie*, Eng. Adm. 1854, 33 Eng. L. & Eq. 572.

<sup>5</sup> *The Vreede Scholtys*, 5 Rob. Adm. 5, note; *The Primus*, cited *supra*.

A trade or a transaction is sometimes made legal by a license given to a party who otherwise would have had no right to carry it on. This license may be "to any person possessing it,"<sup>1</sup> or otherwise be made transferable; but if not so made it is personal only,<sup>2</sup> and it will be fairly but yet accurately if not strictly construed as to all its indulgences.<sup>3</sup> And it must be a license from our own

<sup>1</sup> It has been much disputed in England whether the property of an alien enemy is protected by a license, in which the grantees are described in general terms. In *The Hoffnung*, 2 Rob. Adm. 162, Sir William Scott, after stating that the king might give an enemy liberty to import, said: "But I apprehend that, unless there are very express words to this effect to be found in the license, I am to consider its meaning as not going to that extent, but as giving such a liberty only to subjects of this country; it is a license 'to British subjects' to import, &c.; and, as I understand it, they are to import on their own account, and if it appeared that the importation was on the account of other than British merchants, I should hold, that, under the terms of this license, it could not be considered a legal importation." See also *The Beurse Van Koningsberg*, 2 Rob. Adm. 169. A license to P. B. & C. (who were in fact British merchants), on behalf of themselves and others, to export goods on a certain vessel bearing any flag except the French, was held by the King's Bench not to warrant an export of goods which were at the time of shipment the property of an alien enemy. See also, to the same point, *Flindt v. Scott*, 15 East, 525. This case was reversed in the Exchequer Chamber, 5 Taunt. 674. And it may now be considered as settled, that the property of an enemy is protected by such a license. *Robinson v. Touray*, 1 M. & S. 217; *Hullman v. Whitmore*,

3 Id. 337; *Fayle v. Bourdillon*, 3 Taunt. 546; *Morgan v. Oswald*, Id. 555; *Feise v. Bell*, 4 Taunt. 4; *Schnakoneg v. Andrews*, 5 Taunt. 716; *Usparicha v. Noble*, 13 East, 332. See also *Hagedorn v. Bazett*, 2 M. & S. 100; *Warin v. Scott*, 4 Taunt. 604; *Feise v. Newnham*, 16 East, 197.

<sup>2</sup> *Busk v. Bell*, 16 East, 3; *Barlow v. M'Intosh*, 12 Id. 311; *Grigg v. Scott*, 4 Camp. 339; *Feise v. Thompson*, 1 Taunt. 121.

<sup>3</sup> Sir William Scott, in the case of *The Cosmopolite*, 4 Rob. Adm. 8, 11, said: "Licenses being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority which grants them may be supposed to extend." See also *The Juno*, 2 Rob. Adm. 116; *The Goede Hoop*, Edw. Adm. 328. In this last case the old doctrine was very much modified. The following was laid down by Sir William Scott as the guide for the court in this and subsequent cases: "They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms, requiring, therefore, an enlarged and liberal interpretation. At the same time they are not free from control; restrictions dictated by prudent caution are annexed, and where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this

government; for the mere sailing under an enemy's license constitutes an act of illegality.<sup>1</sup> Nor will a pretended sale prevent adjudication according to real ownership.<sup>2</sup> The fraudulent alteration of a license destroys its validity, even where the person claiming protection is innocent of the fraud.<sup>3</sup> And a wrong description invalidates a license, as where a person is described as of London, merchant, when he resides elsewhere, although he intended to go to London and settle there.<sup>4</sup> The defence of "alien enemy" is one which is not favored by the law,<sup>5</sup> and it

court to apply such an interpretation to a license as would be in direct contradiction to its express terms, or to say that effect should be given to one part and not to another. If the permission is for a ship to go in ballast, it would be impossible for the court to say that it shall go with a cargo; for that would be, not an interpretation, but a contravention of the license. But where it is evident that the parties have acted with perfect good faith, and with an anxious wish to conform to the terms of the license, I presume that I am only carrying into effect the intent of the grantor, when I have recourse to the utmost liberality of construction which it is in the power of this court to apply. As a general rule, therefore, it is to be understood, that, where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the license into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled." See also *Flindt v. Scott*, 5 Taunt. 674; *Klingender v. Bond*, 14 East, 484; and cases *ante*, p. 20, n. 4.

<sup>1</sup> *The Anna Catharina*, 4 Rob. Adm. 107; *The Julia*, 8 Cranch, 181; *The Aurora*, Id. 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143;

*Craig v. United States Ins. Co.*, Pet. C. C. 410. It has been held, in Connecticut, that if the insured obtain such a license through the minister of the neutral power, to a port of whose country the vessel is going, the voyage is not illegal. *Bulkley v. Derby Fishing Co.*, 1 Conn. 571. This decision is not in conformity, however, with those above cited. The same may be said of *Perkins v. N. E. Mar. Ins. Co.*, 12 Mass. 214; *Hayward v. Blake*, Id. 176. See *Ogden v. Barker*, 18 Johns. 87; *Colquhoun v. N. Y. Firem. Ins. Co.*, 15 Id. 352.

<sup>2</sup> *The Vrouw Hermina*, 1 Rob. Adm. 163; *The Sechs Geschwistern*, 4 Id. 100; *The Omnibus*, 6 Id. 71; *The Minerva*, 6 Id. 396; *The Ocean Bride*, Eng. Adm. 1854, 33 Eng. L. & Eq. 576; *The Soglasie*, Eng. Adm. 1854, 33 Eng. L. & Eq. 587. *The Ernest Merck*, Eng. Adm. 1854, 33 Eng. L. & Eq. 594.

<sup>3</sup> *The Louise Charlotte*, 1 Dods. 308.

<sup>4</sup> *Klingender v. Bond*, 14 East, 484. But see *Lemcke v. Vaughan*, 1 Bing. 473, 8 J. B. Moore, 646, 7 Dowl. & R. 236. See generally *Rawlinson v. Janson*, 12 East, 223; *The Jonge Johannes*, 4 Rob. Adm. 263; *The Jonge Klassina*, 5 Id. 297; *The Cousine Marianne*, Edw. Adm. 346; *Robinson v. Morris*, 5 Taunt. 720.

<sup>5</sup> *Shepeler v. Durant*, 14 C. B. 582, 25 Eng. L. & Eq. 334. The court in

has been said that the plea must not only aver such hostile character, but also must set forth every fact that negatives the plaintiff's right to sue.<sup>1</sup> But it has been shown by Mr. Justice Story that this position is not sustained by authority, the true rule being that every fact must appear upon the record which negatives the right of the alien to sue.<sup>2</sup>

Alien friends may be parties to contracts of insurance as fully, to all intents and purposes, as citizens or subjects of the country where the policy is made. And an alien enemy in a country at war with his own may have rights and privileges which the courts of that country may enforce;<sup>3</sup> and if an alien has a license to carry on a certain trade, he may insure it.<sup>4</sup> But it is otherwise with alien enemies generally, as we have seen. It may therefore be very important to ascertain who is, and who is not, an alien.

An alien is one who, in common phrase, belongs to another country; or, in legal phrase, one who owes allegiance to the sovereignty of another country, and has there the rights and

this case had made an order for time to plead, putting the defendant under terms to plead issuably. On the 28th of the month war was declared, and on the 29th the defendant took out a summons for leave to file the plea of alien enemy, which the court refused to grant. *Jervis*, C. J., said: "As far as I am concerned, I should not wish to encourage pleas of this sort. The court will not put the defendant into a position to plead such a plea. There may be countries in which advantage might be taken of such a plea; but fortunately in this country a more liberal policy prevails, and the courts here will require the utmost technical strictness in such cases, and will make every intendment against such a plea."

<sup>1</sup> *Casseres v. Bell*, 8 T. R. 166.

<sup>2</sup> *Society for the Propagation of the Gospel v. Wheeler*, 2 Gallis. 105, 127, 130.

<sup>3</sup> Thus in the case of the *Society for the Propagation of the Gospel v. Wheeler*, 2 Gallis. 105, 135, it being provided

by treaty between England and this country, that the subjects of either country who then held lands in the other should continue to hold them, and that neither they nor their heirs and assigns should be regarded as aliens in respect to the lands and the legal remedies incident thereto, Mr. Justice Story expressed a strong opinion "that as to all the titles and estates within the article, an alien enemy might maintain all the legal remedies" in a time of war as well as when the countries were at peace. In *Wells v. Williams*, 1 Salk. 46, 1 *Ld. Raym.* 282, it was held that an alien enemy living in a foreign country under a safe conduct, or an alien coming to a country in time of peace, and living there under protection, can maintain an action during war.

<sup>4</sup> *Hagedorn v. Reid*, 1 M. & S. 567; *Kensington v. Inglis*, 8 East, 273; *Usparicha v. Noble*, 13 East, 332. See also *De Tastet v. Taylor*, 4 Taunt, 233; *Grigg v. Scott*, 4 Camp. 339.

obligations of a citizen or subject. And, as a general rule, the citizens of a country which is under the temporary or permanent dominion of the enemies of another country are considered as aliens in respect to such country, and all trade with them is illegal. But if the government chooses to recognize the country as neutral, courts of justice are bound by such recognition, and the citizens are treated as subjects of any other neutral power.<sup>1</sup>

Every man has a domicile somewhere or other;<sup>2</sup> and where he has not a domicile, it may be said that he is an alien. The right of a citizen of a country to expatriate himself during war, in order to acquire neutral rights and privileges, has been much discussed in this country, and perhaps on authority the law is not yet settled whether he may do this at all,<sup>3</sup> but it is certain that if he removes,

<sup>1</sup> *Blackburne v. Thompson*, 15 East, 81, 3 Camp. 61; *Hagedorn v. Bell*, 1 M. & S. 450.

<sup>2</sup> *Crawford v. Wilson*, 4 Barb. 504.

<sup>3</sup> See *Murray v. The Charming Betsy*, 12 Cranch, 64. In the *Dos Hermanos*, 2 Wheat. 76, 98, there is a remark upon this point which, although not entitled to the force of a decision, as the opinion turned partly upon another point, is yet entitled to great weight. The question was as to the domicile of the claimant at the port of Carthagena, he having during the war returned to the United States, and become the owner of a privateer at New Orleans. Mr. Justice *Story* said: "In respect to the domicile of Mr. Green, there is certainly much reason to doubt if it would be sufficient to protect him, even if he could show himself, at the time of capture, a citizen of Carthagena. For if, upon his return to New Orleans after the war, he acquired a domicile there (of which the circumstance of his becoming the owner of a privateer in that port affords a strong presumption), he became a redintegrated American citizen, and he could not, by an emigration afterwards, *flagrante bello*, acquire a neutral character,

so as to separate himself from that of his native country." In *The Santissima Trinidad*, 7 Wheat. 283, 347, the same learned judge said: "Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear that this cannot be done, without a *bona fide* change of domicile under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for a commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court. In *Jackson v. N. Y. Ins. Co.*, 2 Johns. Cas. 191, and in *Duguet v. Rhinelander*, 1 Id. 360, it was held that a person cannot expatriate himself in time of war so as to assume the character of a neutral. The Court of Errors, however, reversed the decision in the latter case. 2 Johns. Cas. 476, 1 Caines,

“in order to mask his mercantile projects under a neutral flag,” such an act is fraudulent and of no avail.<sup>1</sup>

Where the domicile is, depends upon the two essential elements of *residence* and *intention*.<sup>2</sup>

Residence implies intention, where there is no evidence to the contrary;<sup>3</sup> and sometimes the whole question of domicile, or alienage, is determined by the consideration whether the residence is of that length, or for that purpose, or of that character, that it implies absolutely *intention*, and therefore proves domicile.

Every case in which this question arises must be judged of by itself. But some considerations and adjudications may be useful in determining it.

Domicile is but a Latin form of the word “home”; and every man has his home, says the Roman civil law, “where he has established his hearth and the sum of his possessions and his fortunes; whence he will not depart if nothing calls him away; whence if he has departed he seems to be a wanderer, and if he returns he ceases to wander.”<sup>4</sup>

Where a man has his birth and parentage (or, to speak more correctly, his origin; for a man may be born in one country, and yet, taking the domicile of his father, belong to another), there, unless circumstances show the contrary, is his domicile. And this domicile remains until it is changed.<sup>5</sup> Nor can it be changed by

Cas. xxv. The Continental jurists generally deny the right of a citizen to transfer his allegiance in time of war. See Vattel, liv. 1, c. 19, liv. 2, c. 27; Grotius de Jure Bel. ac Pac. liv. 2, c. 5, § 2; Puffendorf, Droit des Gens, liv. 8, c. 11, § 3.

<sup>1</sup> See Duguet v. Rhinelander, 2 Johns. Cas. 476, 1 Caines, Cas. xxv.; The Santissima Trinidad, 7 Wheat. 283, cited in the preceding note.

<sup>2</sup> Burnham v. Rangeley, 1 Woodb. & M. 7.

<sup>3</sup> In The Bernon, 1 Rob. Adm. 102, 104, Sir William Scott said: “The presumption arising from a person’s residence is, that he is there *animo manendi*, and it lies on him to explain it.”

<sup>4</sup> Code, Lib. 10, tit. 89, 7.

<sup>5</sup> Brown v. Smith, 15 Beav. 444, 11 Eng. L. & Eq. 6; Sears v. City of Boston, 1 Met. 250; Crawford v. Wilson, 4 Barb. 504; Otis v. City of Boston, 12 Cush. 44. In Bruce v. Bruce, cited 2 B. & P. 229, Lord Chancellor Thurlow said: “A person’s origin in a question of where is his domicile, is to be reckoned as but one circumstance in evidence, which may aid other circumstances; but it is an enormous proposition, that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal.” In Somerville v. Somerville, 5 Ves. 750, 787, it was held that the domicile of origin is to prevail “until the party has not only acquired another, but has manifested and carried into execution an



intention alone, without change in fact,<sup>1</sup> nor by change in fact alone without intent,<sup>2</sup> although, as we have seen, this change of residence may be such as to imply change of intention. And generally if a domicile is once acquired, it is presumed to continue till a new one is clearly shown.<sup>3</sup>

In the nature of things it is impossible to determine by a fixed rule what residence is sufficient to give a national character; nor have any governments or courts endeavored to do so. Various things must be taken into consideration. In few cases are all these present; and where they are so, one may be in one case strong and important while the others are feeble and trifling, and another case may present the exact reverse.

The elements to be considered are, (1.) length of residence; (2.) continuity of residence; (3.) purpose or cause of residence; (4.) character and extent of business done there, and its relation to the person's whole business, or to his business elsewhere; that is, is it principal and dominant, or only ancillary and subordinate; (5.) his household and family ties or relations; (6.) the kind and degree of communication which he keeps up with an earlier home. The general principle is well settled, that if a person goes abroad for the purpose of remaining there permanently, either with the intent of entering into business<sup>4</sup> or not, he is considered as an

intention of abandoning his former domicile, and taking another as his sole domicile." The learned Master of the Rolls then added: "I speak of the domicile of origin rather than of birth; for the mere accident of birth at any particular place cannot in any degree affect the domicile. I have found no authority or dictum that gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicile would follow that of his father. The domicile of origin is that arising from a man's birth and connections."

<sup>1</sup> *Attorney-General v. Dunn*, 6 M. & W. 511; *Hallowell v. Saco*, 5 Greenl. 143; *State v. Hallett*, 8 Ala. 159; *Williams v. Whiting*, 11 Mass. 424;

*Otis v. City of Boston*, 12 Cush. 44; *Hairston v. Hairston*, 27 Miss. 704.

<sup>2</sup> *Bradley v. Lowry*, 1 Speer's Eq. 1; *Granby v. Amherst*, 7 Mass. 1; *Lincoln v. Hapgood*, 11 Id. 350; *Harvard College v. Gore*, 5 Pick. 370; *Cadwalader v. Howell*, 3 Harrison, 138; *Wilton v. Falmouth*, 15 Maine, 479.

<sup>3</sup> *Cadwalader v. Howell*, 3 Harrison, 138; *Kilburn v. Bennett*, 3 Met. 199; *Burnham v. Rangeley*, 1 Woodb. & M. 7.

<sup>4</sup> One of the earliest, and the leading case on this subject is that of *Mr. Whitehill*, cited in *The Diana*, 5 Rob. Adm. 60. Here, a British merchant had gone to St. Eustatius only a day or two before it was taken possession of by a British force, but it being proved that he went for the purpose of remaining

alien.<sup>1</sup> So completely is this rule established, that if a citizen of one country has his commercial domicile in another, he may engage in trade with a country which is at peace with his adopted country, although at war with his native country, and insurance on such trade may be affected in the latter country.<sup>2</sup>

But if a person goes to a foreign country, for a short time and a special purpose, with a decided intention of returning, he would not be thought by any one to acquire a domicile there.<sup>3</sup>

Nor if he is detained against his will and forcibly compelled to remain there, would any length of such enforced residence give him there a legal domicile, or place upon him in his true home — whether that was natural or acquired — the disabilities of alien-

there permanently, his property was condemned. The general rule on this subject is well stated by Sir *William Scott*, in *The Indian Chief*, 3 Rob. Adm. 12, 18, as follows: "No position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of that country." See also *O'Mealey v. Wilson*, 1 Camp. 482; *Willison v. Patteson*, 7 Taunt. 439; *Tabbs v. Bendelack*, 4 Esp. 108; *The Citto*, 3 Rob. Adm. 38; *The Aina*, Eng. Adm. 1854, 28 Eng. L. & Eq. 600; *The Abo*, 1 Spinks, Adm. 347, 1855, 29 Eng. L. & Eq. 591, 594; *The Frances*, 8 Cranch, 363; *Murray v. The Charming Betsy*, 2 Id. 64, 120.

<sup>1</sup> *Thorndike v. City of Boston*, 1 Met. 242; *Laneville v. Anderson*, 17 Jur. 511, 22 Eng. L. & Eq. 641, affirmed in the Privy Council, *Anderson v. Laneville*, 9 Moore, P. C. 325, 29 Eng. L. & Eq. 59.

<sup>2</sup> *Bell v. Reid*, 1 M. & S. 726. And as a citizen of his adopted country, he may in time of peace engage in a trade which is prohibited to the citizens of his native country. *Wilson v. Marryat*, 8 T. R. 31, affirmed in the Exchequer

Chamber, *Marryat v. Wilson*, 1 B. & P. 430.

<sup>3</sup> *Sears v. City of Boston*, 1 Met. 250. In this case a native inhabitant of Boston, intending to reside in France, departed for that country, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for doing it. He returned in about sixteen months, and his family in about nine months afterwards. It was held that his domicile in Boston continued during his absence. See also *The Harmony*, 2 Rob. Adm. 322, *infra*. In the *Ship Ann Green*, 1 Gallis. 274, a Scotchman, who was naturalized in 1804, and joined a commercial house in 1807, and was sent out to Jamaica in 1808 to collect debts due the house, where he remained about six or seven months and then returned to New York, and went out again in 1810, and remained there about a year, and went out a third time in 1811, and was still there at the time this suit was brought, in 1812, was held to be an American citizen.



age,<sup>1</sup> unless while under such restraint he performs certain acts which tend to the support and maintenance of the enemies of the country to which he claims to belong. In which case, as to those acts he would certainly be considered as an enemy.<sup>2</sup>

But whatever was the original purpose, if the residence be long continued, then all the circumstances above enumerated must be considered in determining whether he has changed his residence.<sup>3</sup> And even if he goes there for a special purpose, yet if the time is indefinite and uncertain, his domicile is changed.<sup>4</sup>

<sup>1</sup> *The Ocean*, 5 Rob. Adm. 90.

<sup>2</sup> There is a dictum of Lord *Ellenborough* to this effect in *Bromley v. Hasseltine*, 1 Camp. 75. The question in this case was whether an insurance by an alien resident in an enemy's country, on goods to be delivered for him at a neutral or friendly port, was valid. Lord *Ellenborough* said: "I don't know that merely because an alien happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port are on that account uninsurable. Suppose a British merchant to be entrapped and confined in an enemy's country, it can scarcely be said that all the trade he may still carry on is in aid of the king's enemies, illegal, and incapable of being insured." See also *Bempde v. Johnstone*, 3 Ves. 198, 202, per Lord Chancellor *Loughborough*.

<sup>3</sup> Thus in *Elbers v. United Ins. Co.*, 16 Johns. 128, where a Swede came to the United States for the benefit of his health, and remained there two or three years, transacting business, it was held that as to these transactions he was to be considered as having his domicile in the United States, and that it made no difference whether he had any permanent counting-house there or not.

<sup>4</sup> In *The Harmony*, 2 Rob. Adm. 322, Sir *William Scott* considered the length of time a man resided in a place as the great ingredient in determining whether

his domicile was changed, when he went there for a special purpose. He said: "A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach, though the fact may be true), on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence the plea of an original special purpose could not be averred." The case was also put of an American coming to Europe with six contemporary cargoes, he intending to return as soon as they were disposed of, and the same person coming with one cargo, and remaining to receive five other cargoes, one in each year successively, and the learned judge said: "I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile. In the case of *The Ship Ann Green*, 1 Gallis. 274, 285, Mr. Justice *Story*, after citing the

His assertions on the subject are often of great weight, provided they are not caused by interest, and especially if they are against his interest or known wishes.<sup>1</sup> But the mere fact that one declares himself a foreign citizen, or the reverse, when it may well be that he does this to acquire rights which otherwise he could not possess, or escape from obligations which otherwise he could not avoid, would be of but little importance.<sup>2</sup>

language of Sir *William Scott*, above referred to, said: "Upon a residence, therefore, for mere temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time, and be attended with conduct which demonstrates that new views and new connections have supervened upon the original purposes; but, on the other hand, mere length of time cannot of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, if with a design of permanent settlement, stamps the party with a national character. The question, after all, results in an inquiry into the intention and conduct of the party; and it is extremely difficult to lay down any general rule upon the subject." *Pennsylvania v. Ravenel*, 21 How. 103.

<sup>1</sup> *Thorndike v. City of Boston*, 1 Met. 242. The question in this case was, whether a party should be taxed in Boston, and it was held that a letter from him to an agent expressing his intention to reside abroad was admissible, if written before he knew that a tax had been assessed upon him. See also *Kilburn v. Bennett*, 3 Met. 199; *Burnham v. Rangeley*, 1 Woodb. & M. 7.

<sup>2</sup> In the *Venus*, 8 Cranch, 253, *Washington*, J. said: "The question, whether the person to be affected by the right of domicile had sufficiently made known his intention of fixing himself perma-

nently in the foreign country, must depend on all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. The *Bernon*, 1 Rob. Adm. 102. See the remarks of *Shaw*, C. J., in *Otis v. City of Boston*, 12 Cush. 44, 50.

If one who was a foreign citizen becomes a citizen of this country by naturalization, or by residence, his whole future conduct will be judged of in reference to a principle asserted by many courts, and illustrated by many cases, namely, that the native nationality easily reverts.<sup>1</sup> But a mere visit to his original country would not reintegrate him as a subject of that country, if such visit was intended to be of short duration only.<sup>2</sup>

If a citizen of one country whether by birth or naturalization is doing business in a foreign country, and a war breaks out, the moment he puts himself in *itinere* to return to the country of his birth or adoption, the character which he had by residence, and which had become hostile by the war, is changed, and his native character is resumed.<sup>3</sup> But the mere intention of returning

<sup>1</sup> *La Virginie*, 5 Rob. Adm. 98; *The Indian Chief*, 3 Id. 12. See the remarks of Mr. Justice *Story* on this subject in the case of *The Ship Ann Green*, 1 Gallis. 274, 286, and in *The Ship Francis*, Id. 614.

<sup>2</sup> *The Friendschaft*, 3 Wheat. 14. In this case a British merchant was in Lisbon at the time of the capture of his goods, carrying on business there. He afterwards went to London on business, leaving his affairs in Lisbon in charge of his clerks, and intending to return to that city himself. It was held that he had not become a reintegrated British subject. See also *The Vriendschap*, 4 Rob. Adm. 166; *Laneuville v. Anderson*, 17 Jur. 511, 22 Eng. L. & Eq. 641, affirmed in the Privy Council, *Anderson v. Laneuville*, 9 Moore, P. C. 325, 29 Eng. L. & Eq. 59; *The Ship Ann Green*, 1 Gallis. 274, cited *ante*, p. 27, n. 4; *Burnham v. Rangeley*, 1 Woodb. & M. 7.

<sup>3</sup> *The Indian Chief*, 3 Rob. Adm. 12; *The Ocean*, 5 Rob. Adm. 90. In the case of *The Ship St. Lawrence*, 1 Gallis. 467, 471, Mr. Justice *Story* said: "The cases in which the party's putting himself in *itinere*, to return to his native

country, has been held to exempt his property from the hostile character acquired by residence, are cases where such property has been engaged in a trade completely lawful in the native character. But the principle never has been and never could be extended to protect a trade which was illegal in a native citizen; more especially a trade, which in the native character would be in the highest degree noxious. This distinction pervades the cases and reconciles all the apparent inconsistency." The cases referred to are *The William*, cited in *The Hoop*, 1 Rob. Adm. 196, 8 T. R. 548; *The Indian Chief*, 3 Rob. Adm. 12. In *Amory v. M'Gregor*, 15 Johns. 24, it was held that a citizen of the United States has the right, on war breaking out between that country and England, to withdraw his property purchased before the war, within a reasonable time. In the case of the *St. Lawrence*, it was held that if this right existed, yet that it must be exercised within a reasonable time, and that the withdrawal eleven months after the declaration of war was too late. This decision was affirmed on appeal. 9 Cranch, 120. In *The Venus*, 8 Cranch, 253,

without some overt act is not sufficient.<sup>1</sup> But "the native character easily reverts," as was said by Mr. Justice Story, in an interesting case which came before him in 1813.<sup>2</sup> A man may have a neutral residence, and yet his property may acquire a hostile character.<sup>3</sup> In the same way he may be a merchant in more countries than one; and may thus acquire at least a quasi domicile, beside that of his birth and parentage. And this would be respected by the law, provided there were no indication of fraudulent intention; none, that is, of an intention to mask his trade and nationality for a time; or to give himself two national characters, between which he could choose, from time to time, as suited the exigencies of the moment.<sup>4</sup>

the question was whether the property of persons who were born in England, but naturalized in the United States, and who were settled in England and engaged in the commerce of that country, should be condemned as prize, the property being shipped before they had knowledge of the war, and captured afterwards by an American cruiser. It was contended that American citizens settled in a foreign country are entitled to a reasonable time to elect, after the existence of the war is known to them, to remain or to return to their own country, and that until such election is *bona fide* made, they are to be considered as American citizens, and their property shipped before they have an opportunity to make this election, as protected against American capture. But the court held that until the election was actually made, they were as to their business transactions to be considered as aliens. The dissenting opinion of *Marshall*, C. J., in this case, is one of great ability, and may well cause the doctrine laid down by the majority of the court to be questioned. The objections of the learned chief justice, however, apply more forcibly to the case of a native-born citizen than to a naturalized one being in the country of his nativity,

which latter was the case before the court.

<sup>1</sup> *The Citto*, 3 Rob. Adm. 38; *The President*, 5 Rob. Adm. 277; *Tabbs v. Bendelack*, 4 Esp. 108; *The Venus*, 8 Cranch, 258. In the case of *The Frances*, 8 Cranch, 335, a naturalized citizen returned in time of peace to his native country for the purpose of engaging in trade there, but with the design of ultimately returning to his adopted country. War broke out between the two countries, and he remained in his native country for more than a year in order to wind up his business. During this time he engaged in no new transactions, and often expressed his intention to return to his adopted country, which he actually did a little more than a year after war broke out. The court held that he had regained a domicile in his native country.

<sup>2</sup> *The Ship Francis and Cargo*, 1 Gallis. 614, affirmed by the Supreme Court of the United States in 8 Cranch, 363.

<sup>3</sup> *The San Jose Indiano*, 2 Gallis. 268.

<sup>4</sup> *The Vriendschap*, 4 Rob. Adm. 166; *The Jonge Klassina*, 5 Id. 297; *The Ann*, 1 Dods. 221; *Somerville v. Somerville*, 5 Ves. 750.

We have here, as in other countries, trading partnerships, and even corporations. As a general rule, the former is not a legal person, and can have no domicile. And where a partner of a house of trade in one country is domiciled in another, he is considered as belonging to the country of his domicile.<sup>1</sup> And it has been held that the property of a house of trade in an enemy's country is liable to condemnation, whatever be the domicile of the partners who constitute the house.<sup>2</sup> If some of the partners have a neutral residence, their separate property will not be affected by the fact of their being connected with a house of trade in a hostile country. And when a shipment is made by the house to a partner in a neutral country, or by a partner in a hostile country to a house in a neutral country, it depends upon whose account and risk the goods are shipped whether they are liable as prize.<sup>3</sup> Although a corporation is "an artificial person, a mere legal entity, invisible and intangible," yet it may have a domicile, and for this purpose it is considered as belonging to the country or state by which it is established.<sup>4</sup>

<sup>1</sup> *The Harmony*, 2 Rob. Adm. 322; *The Antonia Johanna*, 1 Wheat. 159.

<sup>2</sup> *The Friendschaft*, 4 Wheat. 105; *The San Jose Indiano*, 2 Gallis. 268.

<sup>3</sup> *The San Jose Indiano*, 2 Gallis. 268.

<sup>4</sup> *Society for the Propagation of the Gospel v. Wheeler*, 2 Gallis. 105, 131. Mr. Justice Story in this case said: "In general an aggregate corporation is not in law deemed to have any commorancy, although the corporators have; yet there are exceptions to this principle; and where a corporation is established in a foreign country by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country becomes hostile, it may for some purposes at least be clothed with the same character." In 1 Phillips, Ins. § 167, this rule is stated differently. It is said that "the national character of a corporation depends upon that of its members," citing *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Bank*

of *U. S. v. Deveaux*, 5 Cranch, 61; and *Society, etc. v. Wheeler*, 2 Gallis. 105.

The last case we have already considered. The other cases decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members who composed the body corporate, and that a body corporate could not be a citizen, within the meaning of that word in the Constitution, giving the court jurisdiction over controversies between citizens of different States. Whether these cases warranted the deduction of Mr. Phillips it is immaterial to consider, as they have been overruled, and it is now held that a corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued. *Louisville Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314; *Lafayette Ins. Co. v.*

If a person transacts business, or resides, in a colony or a commercial factory, under the protection and control of such establishments, and free from the authority of the government of the country, he is considered as partaking of the nationality of such colony or factory.<sup>1</sup> But this exception to the general rule does not apply where the government of the country has the control, although peculiar privileges are granted to the subjects of a particular nation.<sup>2</sup> Although a foreign minister does not lose his domicile in his own country by residing in the foreign one to which he is accredited, yet if he engages in trade there he is, in respect to such trade, considered as a citizen of the country in which it is carried on.<sup>3</sup>

Although for many purposes the domicile of a mariner or other person following the seas is the country of his birth,<sup>4</sup> yet if he engages in a ship or a trade which is hostile to a particular

French, 18 How. 404; *Shelby v. Hoffman*, 7 Ohio State, 450.

<sup>1</sup> Thus an American merchant at Calcutta is considered as under the British rule. *The Indian Chief*, 3 Rob. Adm. 12. And an officer in the service of the East India Company, residing in the East Indies, does not thereby acquire a domicile in that country. *Attorney-General v. Napier*, 6 Exch. 217, 2 Eng. L. & Eq. 397. A merchant carrying on trade at Smyrna, under protection of the Dutch consul, has been considered as a Dutchman. *The Twee Frienden*, cited 3 Rob. Adm. 29. The same has been held of a Jew living in a Dutch establishment under the sovereignty of the rajah of Cochin, on the coast of Malabar. *The Rachel*, cited 3 Rob. Adm. 30. And a Swiss in a French factory in China is considered as a Frenchman. *The Etrusco*, cited 3 Rob. Adm. 31. See also *Whitehill's case*, cited 5 Rob. Adm. 60; *The Boedes Lust*, Id. 233; *The President*, Id. 277.

<sup>2</sup> In *The San Jose Indiano*, 2 Gallis. 268, 292, a treaty between Portugal

and Great Britain provided that British subjects should have the privilege of free trade within the Portuguese dominions, and should have the power of nominating, subject to the approbation and ratification of the crown of Portugal, judges conservators, who should try and decide all causes brought before them by British subjects. It was held, notwithstanding these liberties, that British-born subjects engaged in trade in Portugal partook of the Portuguese character as to their trade. This case was decided on the authority of the *Danous*, 4 Rob. Adm. 255, note. See, however, the remarks of Sir *William Scott* in *The Henrick & Maria*, 4 Rob. Adm. 43, 61; *The Flad Oyen*, 1 Id. 135, 142; *The Nayade*, 4 Id. 251.

<sup>3</sup> *The Indian Chief*, 3 Rob. Adm. 12; *The President*, 5 Id. 277; *The Aina*, Eng. Adm. 1854, 28 Eng. L. & Eq. 600; *The Johanna Emilie*, Eng. Adm. 1855, 29 Eng. L. & Eq. 562; *Arnold v. United Ins. Co.*, 1 Johns. Cas. 363.

<sup>4</sup> *Brown v. Smith*, 15 Beav. 444, 11 Eng. L. & Eq. 6.



country, he will, as to that country, be considered as an alien enemy.<sup>1</sup>

A prisoner of war, for many purposes, is not considered as an alien enemy; and if a subject of a neutral power, he may sue and be sued for contracts entered into while a prisoner.<sup>2</sup>

In general, the courts of no country regard the revenue laws of another country, so far as to consider a contract void for illegality because it violates, or proposes a violation of them.<sup>3</sup>

### SECTION III. — *Of Insurance without a Policy.*

The instrument by which the contract of insurance is expressed is nearly always, in practice, the policy of insurance in use where the insurance is effected; but this contract may be in another form; and we think it may be oral only, and yet binding, for many purposes, and under many circumstances.<sup>4</sup>

<sup>1</sup> The *Soglasie*, Eng. Adm. 1854, 33 Eng. L. & Eq. 587; The *Embden*, 1 Rob. Adm. 16; The *Endraught*, Id. 19; The *Vriendschap*, 4 Id. 166; The *Fredrick*, 5 Id. 8; The *Ann*, 1 Dods. 221. See *Sparenburgh v. Bannatyne*, 1 B. & P. 163, cited in next note.

<sup>2</sup> In *Sparenburgh v. Bannatyne*, 1 B. & P. 163, the plaintiff was the subject of a neutral state, but was taken prisoner while serving in a hostile fleet. He was sent to England by order of the governor of the place to which he was first taken, in a British merchant vessel, which was then short of hands. On the voyage he did his duty as one of the crew, and on arrival in port was delivered over to the commissary as a prisoner of war. To an action for wages for the services performed, the defendant filed the plea of alien enemy, but the court held that he was only to be considered an alien enemy as to the act of hostility, because when he ceased to be hostile, owing no permanent allegiance to the enemy, his

character as an enemy was determined, and that he was entitled to recover.

<sup>3</sup> Thus, if an insurer knows that trade to a certain place is prohibited, and insures a cargo to that place, he is liable if it is seized. *Pollock v. Babcock*, 6 Mass. 234. See also *Lever v. Fletcher, Park, Ins.* 313; *McFee v. South Carolina Ins. Co.*, 2 McCord, 503. In *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, 18, Mr. Justice *Story* states the law as follows: "If the trade is known to be illicit, and can be carried on only by smuggling, and the underwriters do not make an exception of the risk of illicit trade, there is the strongest presumption of their intention to take it." See also *Gardiner v. Smith*, 1 Johns. Cas. 141.

<sup>4</sup> There seems to be no reason why the general principle both of the common and of the civil law, that the evidence of a contract need not be in writing unless expressly required so to be, should not make a parol contract of

If, however, by the act of incorporation of the company the contract is required to be in writing, a parol agreement to insure is not binding.<sup>1</sup> It is provided by law in Massachusetts that all

insurance valid. It seems to have been so assumed in *Smith v. Odlin*, 4 Yeates, 468, by the majority of the court. In *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr, 339, a parol agreement to insure was enforced. See also *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, 280, per *Parker, C. J.*; *Taylor v. Merchants' Ins. Co.*, 9 How. 390. The language of the court in the case of *Real Estate Mut. Fire Ins. Co. v. Roessle*, 1 Gray, 336, seems to imply that the contract is not complete till the policy is delivered. The action was brought by the company to recover the amount of the premiums, deposit notes, and assessments upon two policies of insurance. The policies were made out, but the defendant refused to receive them. The case was submitted without argument, and no authorities are cited by the court. The judgment was for the defendant. Mr. Justice *Dewey*, in delivering the opinion of the court, puts this question: "Suppose a loss by fire had occurred, and the buildings, the subject of the proposed insurance, had been destroyed, would any liability have thereby attached to the plaintiffs, by reason of these policies? Clearly not; because they had not been delivered to the defendant." This question may now be deemed to be set at rest by a recent decision of the Circuit Court of the United States affirmed by the Supreme Court. *Union Mut. Ins. Co. v. Commercial Mut. Mar. Ins. Co.*, 2 Curtis, C. C. 524. A bill in equity was brought by the complainants to compel the specific performance of a contract for reinsurance on the ship *Great Republic*. Some of the facts in the case were in

controversy, but the following are those found by the court, and on which the decision was rendered. The agent of the plaintiffs went to the office of the defendants on the 24th of December, and the president not being in, he filled up a blank proposal in the usual form. He called again that day and saw the president, who offered to make the insurance at a certain rate. The agent said he would consult with his principal, to which the president assented; and on Monday, the 26th, receiving an answer accepting, he saw the president and told him that the offer was accepted. The rate as agreed upon was inserted in the proposal. That night the vessel was destroyed by fire. The proposal was in the usual form, with "Binding," and a blank left for the president's name. This blank had not been filled up. Mr. Justice *Curtis* held that the contract was complete as soon as the proposal was accepted; and the decision was affirmed on appeal. *Commercial Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318.

<sup>1</sup> *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148; *Courtney v. Miss. M. & F. Ins. Co.*, 12 La. 238. These cases proceed on the ground that a corporation is a mere creature of the law, and can act only in the manner prescribed by the act of incorporation which created it. See *Head v. Providence Ins. Co.*, 2 Cranch, 127. In *Berthoud v. Atlantic Mar. & F. Ins. Co.*, 13 La. 539, a written application for insurance was made, and the rate of premium marked on the application by the secretary of the company. The policy was made out and signed, but the plaintiff



Y policies of insurance shall be subscribed by the president, or, in case of his death, inability, or absence, by any two of the directors, and countersigned by the secretary of the company.<sup>1</sup> This has been held to apply merely to the way in which the evidence of the contract should be furnished, and not to the contract itself.<sup>2</sup> But in New York it has been held, in a case where similar formalities were required by the charter of the company, that a parol contract is not binding.<sup>3</sup> In Pennsylvania, it has been said that, although the policy expressly requires that it shall be countersigned by an agent of the company, yet that this may be dispensed with if the intention to execute it is sufficiently plain.<sup>4</sup>

An agreement to insure, entered and subscribed in the usual way on the books of the insurers, is undoubtedly a valid contract of insurance in this country.<sup>5</sup> And it means insurance after the

was informed that it would not be delivered until the premium was paid. Five days afterwards the vessel was burned. The premium not having been previously paid, it was held that the insurers were not liable. See also *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Sandford v. Trust Fire Ins. Co.*, *infra*. In England the contract is required to be in writing. Stat. 35 Geo. 3, c. 63. See also *Morgan v. Mather*, 2 Ves. 15, 18. On the continent generally the maritime codes provide to the same effect. Code de Com. liv. 2, tit. 10, art. 332, 333, 337; Genoa, 2 Mag. 65; Rotterdam, 2 Mag. 94; Amsterdam, a. 23, 2 Mag. 128; Prussia, a. 3, 2 Mag. 189; Hamburg, 2 Mag. 212; Stockholm, 2 Mag. 407. See also *Emerigon on Insurance*, c. 2, § 1.

<sup>1</sup> Rev. Stats. Mass. c. 37, § 13.

<sup>2</sup> *Union Mutual Ins. Co. v. Commercial Mut. M. Ins. Co.*, 2 Curtis, C. C. 524, affirmed 19 How. 318.

<sup>3</sup> *Spitzer v. St. Mark's Ins. Co.*, 6 Duer, 6. In the same volume, on page 14, the case of *First Baptist Church v. Brooklyn F. Ins. Co.*, 18 Barb. 69, to the contrary, is said to have been reversed by the Court of Appeals. In

*Sandford v. Trust Fire Ins. Co.*, 1 N. Y. Legal Observer, 214, before *Hoffman*, V. C., the charter of the company contained the following clause: "The policies must be subscribed by the president, and countersigned by the secretary, and shall be binding and obligatory as if under seal; and there shall be distinctly and legibly printed, or written upon the face of every policy of insurance, or other contract or obligation, made by the said corporation, the amount of its capital actually paid in. It was held that this clause showed that the contract must be in writing, because otherwise the amount of capital could not be printed on the contract. When this case came before the higher court no opinion was expressed on this point, as the Chancellor was of the opinion that no contract had been perfected by the parties. *Sandford v. Trust Fire Ins. Co.*, 11 Paige, Ch. 547.

<sup>4</sup> *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. State, 268.

<sup>5</sup> *Loring v. Proctor*, 26 Maine, 18; *Blanchard v. Waite*, 28 Id. 51. In *Woodruff v. Columbus Ins. Co.*, 5 La. Ann. 697, the insurance company wrote

form of the policy commonly used by the insurers.<sup>1</sup> If an agent of a company is authorized to make an agreement to insure, but not to make out the policy, his principals are liable, on his agreeing to take the risk.<sup>2</sup> So, if the insured has asked proposals or terms of the insurers by letter, and an answer is made by letter, and the insured replies accepting the terms, this is a valid and completed contract as soon as the letter of acceptance is mailed, although it is to be carried out afterwards in point of form, by the giving and receiving of the policy and premium.<sup>3</sup> But if the postmaster is acting as the agent of the party seeking to obtain insurance, the delivery to him of the acceptance of the offer does not complete the contract, if the property on which insurance was sought to be made is destroyed before the acceptance is actually mailed.<sup>4</sup> Either party may rescind, by a notice of rescission sent to and received by the other party before the contract is complete.<sup>5</sup> It has been decided that where a negotiation was com-

on the application, "Taken at three per cent premium." This was considered an acceptance, and the company were held liable. See also *Perkins v. Washington Ins. Co.*, 4 Cowen, 645, 6 Johns. Ch. 485. In England, such a slip, not being stamped, cannot be received in evidence. *Rogers v. M'Carthy, Park, Ins.* 37; *Marsden v. Reid*, 3 East, 572. See *post*, chapter on Stamps.

<sup>1</sup> In *Oliver v. Commercial Mut. Mar. Ins. Co.*, 2 Curtis, C. C. 277, 291, Mr. Justice Curtis said: "Parties who contract for policies of insurance are not expected to insert in the contract every particular needful to be inserted in the policy. The underwriters, on their part, agree to effect insurance; the numerous limitations of their liability as insurers, which appear in the different memorandums and other special printed clauses in the policy, are not mentioned. Their obligation is understood to be, to make out a policy in the usual form, and containing the usual clauses adapted to the case, made by the agreement of the parties." See also *Franklin Fire*

*Ins. Co. v. Hewitt*, 3 B. Mon. 231, 239.

<sup>2</sup> *Palm v. Medina Co. Fire Ins. Co.*, 20 Ohio, 529. The printed form of the application stated that the policy would be issued if the application should be approved of by the company, but it was held that, as the refusal to make out the policy did not proceed on the ground that the risk was objectionable, the company was liable notwithstanding the clause. See *Perkins v. Wash. Ins. Co.*, 4 Conn. 645.

<sup>3</sup> *Tayloe v. Merchants' F. Ins. Co.*, 9 How. 390; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Duncan v. Topham*, 8 C. B. 225; *Mactier v. Frith*, 6 Wend. 103; *Neville v. Merchants & Manuf. Mut. Ins. Co. of Cin.*, 17 Ohio, 192. The case of *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, 281, has not been sustained by subsequent authorities. See note 2, p. 38, *infra*, and the cases there cited.

<sup>4</sup> *Thayer v. Middlesex Mut. Ins. Co.*, 10 Pick. 326.

<sup>5</sup> *Routledge v. Grant*, 3 Car. & P. 267, 4 Bing. 653; *Payne v. Cave*, 3 T.

menced by letter, and in the course of the negotiation an offer made in the letter was orally rejected, the party who made the offer was relieved from his liability, notwithstanding a subsequent acceptance in writing.<sup>1</sup> Thus the insured may alter his mind, and if he can get his refusal of the terms offered by the insurers into their hands before his acceptance reaches them, there is no contract. And the insurers may rescind, if they send their letter or notice thereof, and it reaches the insured before he has mailed his letter of acceptance. But if their letter, although written and mailed before his acceptance, or before their letter offering terms had reached him, does not itself reach the insured until after the mailing of the letter of acceptance, it would seem that the contract is complete.<sup>2</sup> But the acceptance, on whichever side it is made,

R. 148; *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224; *Eliason v. Henshaw*, 4 Wheat. 225.

<sup>1</sup> *Sheffield Canal Co. v. Sheffield and Rotherham Rail. R. Co.*, 3 Rail. R. Cas. 120.

<sup>2</sup> It seems to be settled law, as shown by the authorities already cited, that one who makes a proposition by letter is presumed by the law to be making that offer continually, until the party receiving it has a reasonable opportunity to accept it; if he accepts it, the contract is complete; if he declines, expressly or by silence or neglect, the offer is at end, and no subsequent acceptance makes a contract. It is also settled that the offerer may revoke and withdraw his offer before an acceptance of it. (See cases cited in the two preceding notes.) But the question occurs, whether that is a sufficient revocation, which is made by the offerer, by his mailing the revocation before acceptance, although the acceptance is made before the revocation reaches the acceptor. This precise question has not been determined. It may be stated as the question whether the presumption that the offer continues is so far a pre-

sumption of law that it cannot be rebutted by showing a revocation unknown to the acceptor, or whether it is merely a presumption of fact open to rebutting evidence. We suppose that the recent decisions lead strongly to the rule, that such revocation is not complete unless it reaches the acceptor before his acceptance. This might seem to be a contravention of the rule, that the contract is complete only when the minds of both parties agree on the same thing. But that rule has necessary qualifications. If a party made an offer by mail, no one would suppose that offer revoked by a mere change of will on the part of the offerer, however certainly made known to others, in conversation or otherwise, if not made known to him to whom the offer was made. If the rule were carried so far as this, it would be difficult to know when any contract was made. The rule must mean, therefore, that the law presumes that A's mind remains what it was, as long as B, by A's act, has the right to presume that it so remains. And, therefore, we should say that a revocation did not operate when mailed, just as it would not operate when communicated

must conform exactly — so far as its substance is concerned —

to friends; but that it did operate when known to the acceptor, unless he had then completed the bargain by his assent; and that he did this by mailing his assent. It seems to us that this rule of law is required by a practical necessity. We have said that this is an open question, and it will be found to be so upon a careful examination of the authorities. In order to present the exact existing state of the law, we shall be obliged to make a more extended review of the decisions than we should, were the question not one of so much importance and yet undetermined.

The case of *McCulloch v. Eagle Ins. Co.*, 1 Pick. 281, has been much commented on in the cases, and by text-writers. The facts of the case are very simple. A wrote to B inquiring on what terms he would insure his vessel. On the 1st of January B wrote that he would insure it at a certain rate. On the 2d B wrote another letter retracting. A, before he received the last letter, but after it was mailed, wrote and put into the post-office an answer to B's first letter, accepting the terms proposed. The court held, that the proposal was revoked and the contract was not complete. This case is generally cited as being utterly inconsistent with *Adams v. Lindsell*, 1 B. & Ald. 681; but the facts of the two cases are not the same. In *Adams v. Lindsell* an offer to sell certain goods was made on the 2d of the month. The letter accepting was mailed on the 5th and received on the 9th. On the 8th the offer was revoked by the sale of the goods to another party. It will be seen, therefore, that in this case the retraction of the offer was subsequent in point of time to the mailing of the letter of acceptance, while in

*McCulloch v. Eagle Ins. Co.* it was prior. In *Adams v. Lindsell*, the court said: "The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is complete by the acceptance of it by the latter." This has been supposed to imply, that after a person has accepted an offer by mailing a letter to that effect, he is obliged to remain of the same mind unless notice of his change of intention can be brought to the knowledge of the party making the offer, before the first letter of acceptance is received. That the court did not necessarily mean this is evident from an examination of the facts of the case. It had been argued, on the authority of *Cooke v. Oxley*, 3 T. R. 653, that the contract was not complete till notice of the acceptance arrived, because as the meeting of the minds of the parties constitutes the essence of the contract, the person offering should be proved to be of the same mind. But the court said that the law presumed that a person making an offer, or accepting one, continued of the same mind until his letter (or other information of the change in his mind) reached the other party. If the remark meant more than this, it has not been followed either in England or in this country. See cases cited *ante*, p. 37, n. 5. Having seen, then, that the two cases are quite distinct, let us examine how far they are inconsistent with each other. The case of *McCulloch v. Eagle Ins. Co.* may be considered as deciding, 1st, that a letter accepting does not bind the party accepting, till it is received by the party making the offer, and that until that time, the party offering has a right to retract his offer; and, 2d, that if the

with the proposal, or there is no assent and no contract. For it is a universal principle, that there is no valid contract unless the

letter accepting takes effect, not from its reception, but from the time it was mailed, the letter of retraction must take effect from the same point of time, namely, when it was mailed and not when it was received. Though the first proposition was the one chiefly relied on by the court, yet the second was also considered. The counsel for the plaintiff contended that the putting the letter of the third into the post-office was a delivery to the defendant. "If so," said Mr. Justice *Wilde*, interrupting him, "why was not the putting of the defendant's letter of the second into the post-office a delivery to the plaintiff?" The first proposition must now be considered as contrary to the general current of authorities, and it is settled that offers are to be considered as made and accepted at the time the letters containing them are respectively mailed. *Mactier v. Frith*, 6 Wend. 103; *Adams v. Lindsell*, *supra*; *Potter v. Sanders*, 6 Hare, 1; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Duncan v. Topham*, 8 C. B. 225; *Kufh v. Weston*, 3 Esp. 54; *Stocken v. Collin*, 7 M. & W. 515; *Tayloe v. Merchants' Ins. Co.*, 9 How. 390; *Averill v. Hedge*, 12 Conn. 424; *Vassar v. Camp*, 14 Barb. 341; *Brisban v. Boyd*, 4 Paige, Ch. 17; *Levy v. Cohen*, 4 Ga. 1, 13; *Chiles v. Nelson*, 7 Dana, 281. And in *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. 326, *Shaw*, C. J., said: "It may well be conceded, that, where notice is to be given by mail, a notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party sending it, may be good notice."

It has also been decided, that, after the letter has been mailed, the sender is

not responsible for any fault or negligence on the part of the post-office. *Dunlop v. Higgins*, *supra*; *Duncan v. Topham*, *supra*; *Stocken v. Collin*, 7 M. & W. 515.

In *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 400, it is said by Mr. Justice *Nelson*, that an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. If this doctrine is correct, then *McCulloch v. Eagle Ins. Co.* was wrongly decided. But it must be admitted that this expression of opinion is, to some extent, a *dictum*. This appears by a reference to the facts of the case. The letter proposing the terms of insurance was sent on the 2d of December, the reply accepting was dated and sent on the 21st, and the house was burned on the 22d. There was no pretence that the offer was not in full force on the 21st. The ground of defence was, that as the letter was not received till the 31st, the contract was not complete till then. The head-note in the case of *Hamilton v. Lycoming M. Ins. Co.*, 5 Barr, 339, is to the same effect as the remarks in *Tayloe v. Merchants' Ins. Co.* above cited, and "per *Gibson*, C. J.," is attached to it. And although *Gibson*, J., does not use the very words of the head-note, we think it fairly expresses his opinion, as that may be gathered from the decision; but this opinion must be regarded as *obiter*, the precise question not arising in the case.

It has been recently settled in Massachusetts that where the party making the offer gives a certain time to the other party in which to accept, he has

minds of the parties meet ; that is, agree together about the same thing, in the same sense.<sup>1</sup>

a right to retract his offer within the time, provided he does so before the other accepts. *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224. And in *Eliason v. Henshaw*, 4 Wheat. 225, the court said : "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made." Now, if no obligation was imposed it would seem to follow that the party making the offer has the right to retract it any time before the letter of acceptance is mailed. And this is not disputed, but it is contended that the retraction must reach the other party before the letter of acceptance is mailed. This proposition may be, however, open to the objection that it makes the letter of retraction date from the time when it is received, while the others date from the time when they are sent ; and that if this be the law, a party has a right to retract, but not the power to make that retraction immediately effectual. But we think it a sufficient answer to this objection, that, while the party has a perfect right to change his mind when he will, he has no right to

change the rights of the other party, except by an expression of his change of mind. If the offer be made by conversation, whatever be the change of mind, if it be silent it is ineffectual, nor has it any legal force until that change of mind is expressed and there be an uttered withdrawal. And if the bargain be made by letter, the reception of the letter by the person to whom it is sent is the best and indeed only equivalent of the expressed retraction by words spoken and heard. There is certainly much want of unanimity, not only as to the rule of law, but as to the meaning and effect of the cases. In *Falls v. Gaither*, 9 Porter, 605, the following case is put by the court : "Suppose A offers to sell B a slave, B accepts the offer by addressing a letter to A, assenting to his terms ; if the latter did not, previous to the date of B's letter, recall the offer, he is bound by the contract, but if he withdrew it by a letter sent to B before B's letter was written, the acceptance of the letter would be unavailing for any legal purpose, and this too though the letter of withdrawal was not received." The court reviewed the two cases of *McCulloch v. Eagle Ins. Co.*, and *Adams v. Lindsell*, and gave the

<sup>1</sup> *Routledge v. Grant*, 3 Car. & P. 267, 4 Bing. 653 ; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357 ; *Eliason v. Henshaw*, 4 Wheat. 225 ; *Hutchison v. Bowker*, 5 M. & W. 535. In the late case of *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. State, 268, the party was already insured, but wished to effect another insurance with the same company on the same subject-matter on different terms. He agreed with the agents of

the company on the terms, subject to the ratification by the company. A policy differing from what was agreed on was sent him with the request that he would return the first, and pay the balance due, if he wished to accept the second policy, or else to return the second. He retained the second, but did not return the first or pay the balance. Held, that this was not evidence of his acceptance of the terms proposed.



X Where a policy is made absolutely void by a breach of any of its conditions, it is not revived by a mere waiver.<sup>1</sup> But generally, if

preference to the latter, and it may, therefore, be inferred that they could not have understood the language used by the English court in the broad extent claimed by the text-writers. Mr. Justice *Marcy*, in *Mactier v. Frith*, said: "The principle of the decision of the King's Bench is simply, that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice." By the civil law there is no contract if the letter of retraction is written and sent before the letter of acceptance is sent. *Pothier, Contrat de Vente*, p. 1, § 2, art. 3,

n. 32, *Cushing's Translation*, p. 18, says: "In order that the consent of the parties may take place in the last-mentioned case, it is necessary that the will of the party, who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. This will is presumed to continue, if nothing appears to the contrary, but if I write a letter to a merchant living at a distance, and therein propose to him to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die, or lose the use of my reason, although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death, or insanity, makes answer that he accepts the proposed bargain, yet there will be no contract of sale between us;

<sup>1</sup> *Smith v. Saratoga County Mut. Fire Ins. Co.*, 3 Hill, 508, 511, per *Bronson, J.* See also *Neely v. Onondaga Co. Mut. Ins. Co.*, 7 Hill, 49. A forfeiture, however, arising from a deviation may be waived by writing. See *post*, c. 8, § 6. In *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154, the assured, in his application for insurance against a fire risk, which was made a part of the policy, had untruly stated that there were no buildings within ten rods of the buildings insured. The insurers, with a knowledge of the loss and of the inaccuracy of the statement, afterwards made assessments on the premium note given by the assured, which he had paid. Held, that the insurers were

estopped by these facts from setting up the warranty, and were liable for the loss. But see *Smith v. Saratoga Co. Mut. Ins. Co.*, 3 Hill, 508; *Neely v. Onondaga County Mut. Ins. Co.*, 7 Hill, 49; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210. Whether a mere parol waiver would be sufficient depends, we think, upon the further question whether the policy provides that it shall be in writing, for generally a parol waiver would be sufficient. See *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray, 169. In *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 149, it was held that a verbal waiver without further consideration was not binding.

certain things were to be done before the contract would be complete, the issuing of the policy would be a waiver of their performance.<sup>1</sup>

SECTION IV.—*Of the Form and Essentials of a Policy of Insurance.*

The policy varies in different States, and from time to time in all our States; but the general form and phraseology of the old English policy is usually, or indeed always, retained; and it might subject all parties to much inconvenience, if forms and phrases were abandoned of which the precise meaning has been at length settled, by long and expensive litigation.

for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills which is necessary to constitute the contract of sale. This is the opinion of Bartholus, and the other jurists cited by Bruneman, ad. I. 1, § 2, D. de contrah. empt. (18, I. 1, § 2), who very properly rejects the contrary opinion of the Gloss, *ad dictam legem*." He then goes on to say, that if the merchant suffer any wrong through the refusal, he has his right of action, though there be no contract. Toullier, also, vol. 6, No. 30, puts this case: "Offer made January 1st, acceptance January 5th. The letter of the 5th arrives on the 8th, but on the 7th, the acceptance being unknown, I revoke. Held, no contract." Mr. Justice Ware, in the case of *The Palo Alto*, Daveis, 357, held, that an offer until received is but a proposition *in mente retentum*, and that the revocation must date, therefore, from the same time, that is, when it was received. Mr. Justice Duer, in an elaborate note in his *Treatise on Insurance*, Vol. I. p. 116, supports with great ability the doctrine that the party accepting must have no-

tice of the retraction before the letter of acceptance is mailed. And this learned jurist founds this opinion upon his construction of *Adams v. Lindsell*. And he considers the case of *Head v. Diggon*, 3 Man. & R. 97 (if it was decided on the facts of the case), to be inconsistent with his views of the law. In this case A offered goods to B at a certain price, and gave him three days in which to make up his mind. Before the time expired A offered the goods to C. Held, that B could not declare against A as upon an absolute bargain. Although the case may have gone off on a question of pleading, still it is so similar to *Boston & Maine Railroad v. Bartlett*, *supra*, that Mr. Duer may, therefore, perhaps, be supposed as differing from that case. At all events we consider *Boston & Maine Railroad v. Bartlett* as unquestionable law.

<sup>1</sup> *Hall v. Peoples' Mut. F. Ins. Co.*, 6 Gray, 185. *Liberty Hall Association v. Housatonic F. Ins. Co.*, 7 Gray, 261. It was held, in this case, that the issuing of a policy upon an application for insurance, one interrogatory in which was unanswered, was a waiver of that defect.



The policy is subscribed only by the insurers; but it is a binding contract, or evidence of one, on both sides; and as soon as there is an inception of the risk the insured is bound by the policy, as respects the premium and otherwise, as much as if he signed it himself.<sup>1</sup> But until there is an inception of the risks insured against, the insured has his option whether they shall begin under the policy or not.<sup>2</sup> Therefore, until these risks are incurred, so as to make him liable for the premium, there is no obligation resting on him that can be enforced by the insurers. All the stipulations on his part are merely conditions, a compliance with which is necessary to enable him to recover against the insurers; but no action can be maintained by them against him.

The policy which usually states the reception of the premium binds the insurers, although the premium has not been paid, nor a note for it given; and this, even if the policy was not delivered from the office, if it was only delayed, and there was evidence otherwise of a completion of the contract.<sup>3</sup> And if the policy provides that there shall be no insurance until the actual payment of the premium, as this provision is inserted for the benefit of the insurer, it may be waived by him or his agent.<sup>4</sup> And if a policy be delivered after the day of its date, it may take effect from its date, as if it had then been delivered, if this be the manifest intention of the parties.<sup>5</sup>

<sup>1</sup> *Ins. Co. of Penn. v. Smith*, 3 Whart. 520, 529, per *Rogers*, J.; *Patapsco Ins. Co. v. Smith*, 6 Harris & J. 166.

<sup>2</sup> *Tyrie v. Fletcher*, Cowp. 666, per Lord *Mansfield*; *Taylor v. Lowell*, 3 Mass. 331, 343; *Emerigon*, c. 3, s. 1, § 4, *Meredith's ed.*, 52. See also *post*, Of the Return of Premium.

<sup>3</sup> *Power v. Butcher*, 10 B. & C. 329. In *Kohne v. Ins. Co. of North America*, 1 Wash. C. C. 93, which was an action of trover for a policy of insurance, the plaintiff's agents had settled the terms of insurance with the president of the insurance company, but had left the office before the policy was filled up. It was filled up a few hours afterwards, and the president gave notice of this to the agent, mentioning at the same time

that information had been received that the ship had been captured and carried into Halifax. Both parties were ignorant of the loss when the policy was executed. The agent afterwards called to deliver the premium note and receive the policy, but the company refused to deliver it. Mr. Justice *Washington* charged the jury that the agreement of insurance was not inchoate, but perfected. The plaintiff recovered. See *Warren v. Ocean Ins. Co.*, 16 Maine, 439; *Loring v. Proctor*, 26 Id. 18; *Blanchard v. Waite*, 28 Id. 51; *Bragdon v. Appleton Mut. F. Ins. Co.*, 42 Id. 259; and cases *ante*, p. 34, n. 4; p. 35, n. 1.

<sup>4</sup> *Goit v. National Protection Ins. Co.*, 25 Barb. 189.

<sup>5</sup> *Lightbody v. North American Ins.*

The general rule is, that if a policy insures the interest of one person only, no other person can show that it was also intended to cover his interest;<sup>1</sup> but it is not regarded as insuring the interest of one person only, if the policy contains the general phrase "for all whom it may concern,"<sup>2</sup> or some other expression indicating that the assured acts as agent or trustee for another, in which case such other person may prove his interest.<sup>3</sup> This phrase, however,

*Co.*, 23 Wend. 18. This was an insurance against fire. On the day of the date of the policy, a valid agreement for insurance had been entered into with the company's agent and the premium paid. The policy was delivered after the loss.

<sup>1</sup> *Turner v. Burrows*, 5 Wend. 541; *Holmes v. United Ins. Co.*, 2 Johns. Cas. 329; *Newson v. Douglass*, 7 Harris & J. 417; *Wise v. St. Louis Mar. Ins. Co.*, 23 Mo. 80. An insurance by one partner in his own name, without general words, covers his interest only. *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419; *Pearson v. Lord*, 6 Mass. 81; *Turner v. Burrows*, 5 Wend. 541. See also *Bell v. Ansley*, 16 East, 141; *Hibbert v. Martin*, 1 Camp. 538; *Cohen v. Hannam*, 5 Taunt. 101; *Lawrence v. Sebor*, 2 Caines, 203. So also in the case of part-owners, *Robinson v. Gleadow*, 2 Bing. N. C. 156; *Bell v. Humphries*, 2 Stark. 345; *Foster v. U. S. Ins. Co.*, 11 Pick. 85; *Dumas v. Jones*, 4 Mass. 647; *Finney v. Bedford Com. Ins. Co.*, 8 Met. 348; *Murray v. Columbian Ins. Co.*, 11 Johns. 302; *Garrell v. Hanna*, 5 Harris & J. 412.

<sup>2</sup> Blank insurances were formerly in use in England. This practice was abolished by 25 Geo. 3, c. 44, which statute directed that the name of the party interested in the insurance, or that of his agent, should appear in the policy. It was construed to require in all cases the insertion of the names of the persons interested, or of the names

of the agents, as agents for the persons interested, who were in that case also required to be named in the policy. *Pray v. Edie*, 1 T. R. 313; *Cox v. Parry*, 1 T. R. 464; *Wilton v. Reaston*, Park on Ins. 19. This statute was repealed and superseded by 28 Geo. 3, c. 56, which is now in force. The construction given to this statute is very liberal. *Wolff v. Horncastle*, 1 B. & P. 316; *Bell v. Gilson*, Id. 345. All that is necessary to answer its requirements is, that the name of the party effecting the policy be inserted. This person in England is usually an insurance broker. It is not necessary that he should appear to sign as agent. *De Vignier v. Swanson*, 1 B. & P. 346, n. See also *Hibbert v. Martin*, 1 Camp. 538; *Hagedorn v. Oliverson*, 2 M. & S. 485.

<sup>3</sup> *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84; *Waters v. Monarch Life and Fire Ins. Co.*, 5 Ellis & B. 870, 34 Eng. L. & Eq. 116. In *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925, 6 Eng. L. & Eq. 312, the policy stated that Kearney had represented to the company that he was interested in, or duly authorized as owner, agent, or otherwise, to make the assurance. It was held that an action might be brought on the policy by all the parties interested. The following citation will show the ground on which the decision proceeded: "It seems to us that they covenanted to pay to the persons who were interested in that subject-matter and for

applies only to those who were contemplated at the time of the insurance, and who then had an insurable interest in the subject-matter.<sup>1</sup> But it is not necessary that a specific party be intended, if the intention is to cover generally those who have insurable interests; for the intention of the insured, or of the named party, determines the application of this clause. And if A effects insurance in his own name, a payment of a loss to him will exonerate the underwriters.<sup>2</sup>

It has been contended that a mutual-insurance company cannot insure parties who have no interest in the subject-matter insured, and cover the interest of the owners under the general phrase, "for whom it may concern," on the ground that such insur-

whom the policy was effected; *certum est quod certum reddi potest*. A designation which cannot be mistaken is, for this purpose, as good as the actual name of the individual. The company engaged to make good all losses and damages which might happen to the subject-matter of the said policy in respect of three hundred pounds assured. To whom were they to make good? Necessarily to the parties interested in the subject-matter who were damaged by the loss. These parties were the assured, and accordingly the stipulations of the policy by the company are with the assured."

In *Duncan v. Sun Ins. Co.*, 12 La. Ann. 486, the general rule was thus stated by the court: "If, upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is that the party named as assured only sought to protect his own interest, the contract is not to be extend-

ed so as to cover the interest of a third person."

<sup>1</sup> *Routh v. Thompson*, 11 East, 428; *Bauduy v. Union Ins. Co.*, 2 Wash. C. C. 391; *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594; *Haynes v. Rowe*, 40 Maine, 181; *Protection Ins. Co. v. Wilson*, 6 Ohio State, 553; *Seamans v. Loring*, 1 Mason, 127; *Lambeth v. Western F. & Mar. Ins. Co.*, 11 Rob. La. 82; *Alliance Mar. Assurance Co. v. Louisiana State Ins. Co.*, 8 La. 1, 11; *Frierson v. Brenham*, 5 La. Ann. 540. In *Newson v. Douglass*, 7 Harris & J. 417, 450, *Buchanan, C. J.*, said: "'Whom it may concern' is a technical phrase, common to policies of insurance, and is understood to mean, not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency, and, proceeding upon that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction; and he, for whose benefit the insurance is procured, is the person in the contemplation of the contract, — is he whom it alone concerns."

<sup>2</sup> *Hermann v. La. State Ins. Co.*, 7 La. 502.

ance would not give the office the right to deduct from the amount of the loss what might be due from the owner of the property from other transactions. But this objection has been held to be of no force, as there would be no practical difficulty in making the adjustment.<sup>1</sup>

The intention of the party who effects the insurance determines the application of this clause, where insurance has been effected by him without previous authority, and the validity of the insurance depends on a subsequent ratification. And to make a ratification of any avail, it is necessary that the insurance should have been made for the benefit of the party ratifying the same.<sup>2</sup> If, however, there was a previous authority, the intention of the party ordering the insurance, or giving the authority, must determine whose interests are governed by the general clause.<sup>3</sup>

"On account of owners" means any one intended who is an owner of the subject-matter insured.<sup>4</sup> And if the phrase be "on account of whom it may concern at the time of loss," they will be covered who then own the property, although many assignments have been made subsequent to the insurance.<sup>5</sup> If one owns different parts in different rights, as owner, consignee, trustee, &c., all are covered by an insurance in his own name.<sup>6</sup> And if he has any interest, of any kind, in the subject-matter of the insurance, which comes within the description in the policy, the insurers are liable, whatever may have been the nature of his interest or his intention.<sup>7</sup>

<sup>1</sup> *Cobb v. New England Mut. Mar. Ins. Co.*, 6 Gray, 192.

<sup>2</sup> *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151; *Bauduy v. Union Ins. Co.*, 2 Wash. C. C. 391; *Newson v. Douglass*, 7 Harris & J. 417, 451, per *Buchanan, J.*; *De Bollè v. Pennsylvania Insurance Co.*, 4 Whart. 68; *Hagedorn v. Oliver-son*, 2 M. & S. 485.

<sup>3</sup> *Newson v. Douglass*, *supra*; *Holmes v. United Ins. Co.*, 2 Johns. Cas. 329.

<sup>4</sup> *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594, 1 Wend. 561. See also *Foster v. United States Ins. Co.*, 11 Pick. 85.

<sup>5</sup> *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

<sup>6</sup> *Carruthers v. Sheddon*, 6 Taunt. 14, 1 Marsh. 416; *Hiscox v. Barrett*, cited 16 East, 145; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Oliver v. Greene*, 8 Mass. 133; *Millaudon v. Atlantic Ins. Co.*, 8 La. 557; *Wolff v. Horncastle*, 1 B. & P. 316; *Irving v. Richardson*, 2 B. & Ad. 193. Also *Murray v. Columbian Ins. Co.*, 11 Johns. 302. In this case the plaintiff, who was the owner of two thirds of a cargo, insured the whole in his own name, and on his own account. He claimed to have a lien upon the other third. It was decided that he had not, and, on that ground, that his insurance covered only the two thirds.

<sup>7</sup> *Wolff v. Horncastle*, 1 B. & P.

Where the expression "all whom it may concern," or the like, covers many persons, whose interests are not strictly joined, as partners,<sup>1</sup> but several, as part owners or tenants in common, each may sue as on an independent policy made to him, unless the policy itself shows a joint contract. So also where different individuals are insured in the same policy for distinct sums, and upon distinct interests.<sup>2</sup>

And a policy insuring A. B. "for —," is one "for all whom it may concern," provided this blank were intended to be filled, but not otherwise.<sup>3</sup>

And insurance of A, "as agent for B," confines the policy to the interest of B, although, when B directed the insurance, he intended it for another.<sup>4</sup>

But if the nominal assured be described as "agent" generally, this is equivalent to "for whom it may concern."<sup>5</sup> And if the

316. In this case A consigned a cargo to B, and drew bills upon him to the amount of it in favor of C, his general agent. A sent these bills, together with the bills of lading, to C, desiring him to transmit them to B, that B might have an opportunity of insuring. He also drew a bill for £ 300 on C, which C accepted and paid. B refused to take the consignment, or accept the bills drawn upon him. C then effected a policy in his own name, with the general clause of the English policy, and informed A thereof, who approved of his conduct. It appeared that the intention of C in effecting the insurance was to cover, not his own interest, but that of the consignor. In an action by C upon the policy, averring in one of the counts an interest in himself, it was held that he had an insurable interest to the amount of £ 300, the extent of his lien. Lord *Ellenborough*, in the subsequent case of *Conway v. Gray*, 10 East, 536, 546, deemed it "very questionable whether any policy which is effected clearly to cover the interest of the consignor can be applied to protect the interest of the

consignee." This doubt, however, seems not to be justified. The case itself established no such doctrine. Neither does the case of *Toppan v. Atkinson*, 2 Mass. 365, establish a doctrine in conflict with that laid down in *Wolff v. Horncastle*. The plaintiff, in this case, expecting goods to be shipped to him as owner, insured them in his own name. Other goods were consigned to him on account and at the risk of the shippers. The plaintiff was only the general creditor of the shippers, and consequently had no lien upon the goods, and no insurable interest. See *Turner v. Burrows*, 8 Wend. 144; 2 Duer. Ins. 39.

<sup>1</sup> In which case the policy is not applicable to the separate interest of either. *Cohen v. Hannam*, 5 Taunt. 101.

<sup>2</sup> *Aldrich v. Equitable Safety Ins. Co.*, 1 Woodb. & M. 272; *Blanchard v. Dyer*, 21 Maine, 111.

<sup>3</sup> *Turner v. Burrows*, 8 Wend. 144, 150, 24 Wend. 276, per *Walworth*, Ch.

<sup>4</sup> *Russell v. N. Eng. Mar. Ins. Co.*, 4 Mass. 82.

<sup>5</sup> *Davis v. Boardman*, 12 Mass. 80. In this case the policy stated that "A. B.

policy contains a designation applicable to many persons, the intention of the insured must determine who is covered.<sup>1</sup>

In this country, a policy made in any form, by which in substance and effect the party named is insured, not for himself, but for others, although it may, and sometimes must, be sued in the name of the party named, gives to the insurers no right to make any defence applicable to him and not to the parties actually in interest.<sup>2</sup>

An agent causing insurance to be made must have full powers to do so. This authority may be derived from and proved by the circumstances of the case or usage.<sup>3</sup>

But a mere general authority, even to act in relation to a ship, is not enough; for a "ship's husband," as such, cannot insure for the owners, without special authority from them.<sup>4</sup> Nor can a master who is sailing a vessel on shares insure the interest of the owners in the freight.<sup>5</sup> But if the part-owners are also partners, an order to insure the ship given by one is sufficient to authorize the insurance of the interest of all.<sup>6</sup>

The general principles of adoption and ratification of contracts apply to contracts of insurance. Hence, if a policy be made by one who purports to be an agent, the party whom the agent intends as principal may ratify the act of him who had no previous authority to be his agent; and by such ratification, although it be after a loss, may confirm and adopt the contract of insurance.<sup>7</sup> And it has been held that the bringing an action on the policy by

or as agent, doth make insurance," etc. The insurance had been effected for A. B. and another joint owner. Held, that A. B. might recover the whole amount insured in his own name, for the use of himself and the other joint owner. Where one insures "as agent," no interest of his own would be covered.

<sup>1</sup> *Carruthers v. Sheddon*, 6 Taunt. 14; *Church v. Hubbard*, 2 Cranch, 187, 197.

<sup>2</sup> *Hurlbert v. Pacific Ins. Co.*, 2 Sumner, 471; *Williams v. Ocean Ins. Co.*, 2 Met. 303; *Aldrich v. Equitable Safety Ins. Co.*, 1 Woodb. & M. 272; *Gordon v. Church*, 2 Caines, 299.

<sup>3</sup> *Barlow v. Leckie*, 4 J. B. Moore, 8.

<sup>4</sup> *French v. Backhouse*, 5 Burr. 2727; *Foster v. United States Ins. Co.*, 11 Pick. 85; *Finney v. Warren Ins. Co.*, 1 Met. 16.

<sup>5</sup> *Haynes v. Rowe*, 40 Maine, 181.

<sup>6</sup> *Hooper v. Lusby*, 4 Camp. 66.

<sup>7</sup> *Lucena v. Craufurd*, 1 Taunt. 325, 5 B. & P. 269; *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S. 485; *Steinback v. Rhinelanders*, 3 Johns. Cas. 269, 281, per Kent, J.; *Watkins v. Durand*, 1 Porter, 251; *Bridge v. Niagara Ins. Co.*, 1 Hall, 247; *Loring v. Proctor*, 26 Maine, 18, 30.



the principal in his own name is sufficient evidence of the ratification of the act of the agent.<sup>1</sup> But if no ratification is shown, and the action is brought in the name of the agent, he can only recover to the extent of his interest.<sup>2</sup> But if the goods are insured by a consignee, or a warehouseman, who describes them as goods in trust, he can recover not only to the extent of his lien for charges, commissions, &c., but also to the full value of the goods, and the balance will be held in trust for the owner of the goods.<sup>3</sup> But, as between the insured and the owner of the goods held by him in trust, the latter cannot recover, unless it appears that he had elected to adopt the policy before its force as an insurance upon his goods has been in any degree impaired by any act of the insured, or that the latter has actually received money from the insurance company on account of goods other than his own. This of course only applies to the case of a person who voluntarily undertakes to procure insurance by a policy which covers goods of others as well as his own, and which he is under no obligation to insure.

If insurance is effected by an agent for account of whom it may concern, it is clear that the agent may bring an action on the policy in his own name;<sup>4</sup> yet as this "is upon the presumption that his agency is continued, and not disavowed by the party in interest," he cannot maintain the action if his authority is disavowed by the real party in interest before suit is brought, unless the agent has a lien or other interest in the property, which the person whose property is insured cannot defeat.<sup>5</sup>

<sup>1</sup> *Finney v. Fairhaven Ins. Co.*, 5 Met. 192. See also *Oliver v. Commercial Mut. Mar. Ins. Co.*, 2 Curtis, C. C. 277, 296; *Blanchard v. Waite*, 28 Maine, 51. There was also in this last case further evidence of a ratification, as the premium note, signed by all the owners, was tendered to the insurers.

<sup>2</sup> *Foster v. United States Ins. Co.*, 11 Pick. 85.

<sup>3</sup> *Waters v. Monarch Life & Fire Ins. Co.*, 5 Ellis & B. 870, 34 Eng. L. & Eq. 116. In this case warehousemen insured merchandise described as "the property of the assured, or held by them in trust, or on commission," in cer-

tain specified buildings. A loss having taken place, it was held, that the warehousemen could recover the whole value of the goods insured, and not merely to the amount of their particular interest, and that after deducting their charges they were to hold the balance for the owners of the goods, although the latter had not been informed of the insurance. See also *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84, 100.

<sup>4</sup> *Davis v. Boardman*, 12 Mass. 80; *Ward v. Wood*, 13 Mass. 539; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198.

<sup>5</sup> *Reed v. Pacific Ins. Co.*, 1 Met. 166. If, however, the property insured is

In a recent case in New York, the policy described the goods as the property of the insured, or held by him in trust. The insured did not recover under the policy the entire value of his own goods. It was held that the owner of the goods in trust could not recover from him a proportionate part of the sum recovered, he not having ratified the insurance until after the loss was paid, and the sum not being sufficient to cover the loss of the insured.<sup>1</sup>

owned by several persons, and one of them revokes the power of the agent, this will not prevent his carrying on the suit for the benefit of the others. *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. In *Cranston v. Philadelphia Ins. Co.*, 5 Binn. 538, it was held that if an agent pays the premium, he has a lien on the policy for it so long as he retains posses-

sion of the policy, but if he delivers it up his lien is gone. And although the underwriters are entitled to deduct the premium, if unpaid, from the loss, yet if the agent pays it, he cannot stand in their place, and claim payment out of the sum due.

<sup>1</sup> *Stillwell v. Staples*, 19 N. Y. 401.



## CHAPTER III.

## OF THE ASSIGNMENT AND NEGOTIABILITY OF POLICIES OF INSURANCE.

POLICIES of insurance are not negotiable instruments, either in England or in this country,<sup>1</sup> but they may, like *choses in action*, generally be assigned so as to give the assignee the right of instituting a suit in the name of the assignor. And if the policy be assigned, although without notice to the underwriters, the assignment vests an equitable interest in the assignee.<sup>2</sup> But in such a case the general rule, changed by statute in some of our States, is, that the action must be brought in the name of the assignors.<sup>3</sup>

<sup>1</sup> *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush. 337, 345; *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 10 Foster, 231; *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444, 450. By the law of France, a policy may be made negotiable by the loss being made payable to order, or to bearer. Emerigon, c. 18, § 2, ed. 1783, p. 249, 250; 2 Valin, 45; Alauzet, vol. 1, 360; 2 Id. 135. But it may be doubted whether in England, or in this country (excepting those States in which the common law is changed by statutory provisions in this respect), an assignee of such a policy could maintain an action upon it in his own name. A bill of lading "to order or assigns" is not such a negotiable instrument. *Thompson v. Dominy*, 14 M. & W. 402; *Howard v. Shepherd*, 9 C. B. 297; *Sanders v. Vanzeller*, 4 Q. B. 260; *Tindal v. Taylor*, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210; *Dows v. Cobb*, 12 Barb. 310; and a policy of insurance would doubtless be governed by the same rules of law. See also *Skinner v. Somes*, 14 Mass. 107.

<sup>2</sup> *Wakefield v. Martin*, 3 Mass. 558;

*Spring v. South' Carolina Ins. Co.*, 8 Wheat. 268.

<sup>3</sup> *Earl v. Shaw*, 1 Johns. Cas. 313; *Gourdon v. Ins. Co. of N. A.*, 3 Yeates, 327, 1 Binn. 430, n. In *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88, the insured assigned his interest in the subject-matter with the assent of the underwriters, but did not assign the policy. The policy contained the usual clause that the interest of the insured should not be assigned without the consent of the corporation. The assignee sued in his own name. The court held, that the action should have been brought in the name of the assignor, and the plaintiff, therefore, was nonsuited. The court said: "We know of no principle upon which the assignee of a policy of insurance can be allowed to sue upon it in his own name. The general rule applicable to personal contracts is, that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him." See also *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 10 Foster, 231; Pol-

The right of the assignee, though said to be only equitable, is enforced at law; and, indeed, the assignee will not be permitted to proceed in equity, unless there are especial reasons for his so doing. And it is not a sufficient reason that the action must be brought in the name of the assignor.<sup>1</sup> A parol agreement, together with delivery, will constitute a sufficient assignment of the policy.<sup>2</sup> Generally the assignor of a *chose in action* cannot prejudice the rights of the assignee after the debtor has assented to the assignment.<sup>3</sup> But where the owner of property mortgaged effects insurance in his own name, "loss, if any, payable to the mortgagee," or assigns the policy to the mortgagee with the assent of the insurer, the insurance is upon the interest of the mortgagor, and he does not cease to be a party to the original contract with the insurers, and any act of his which would otherwise render the policy void will have this effect, although the policy is in the hands of the mortgagee.<sup>4</sup> But if the insurers, at

*lard v. Somerset Mut. F. Ins. Co.*, 42 Maine, 221.

<sup>1</sup> *Motteux v. London Ass. Co.*, 1 Atk. 545; *Dhegetoft v. London Ass. Co.*, Mosely, 83, *nom.* *De Ghettoff v. London Ass. Co.*, 4 Brown, P. C. 436; *Hammond v. Messenger*, 9 Sim. 327; *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; 1 *Parsons on Contracts*, 193, n. (f).

<sup>2</sup> *Powles v. Innes*, 11 M. & W. 10, 12, per *Parke*, B.; *Wells v. Archer*, 10 S. & R. 412.

<sup>3</sup> *Hackett v. Martin*, 8 Greenl. 77; *Hatch v. Dennis*, 1 Fairf. 244; *Matthews v. Houghton*, Id. 420; *Frear v. Evertson*, 20 Johns. 142.

<sup>4</sup> *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray, 169; *Bowditch Mut. Ins. Co. v. Winslow*, 8 Gray, 38; *Loring v. Manuf. Ins. Co.*, 8 Gray, 28; *Edes v. Hamilton Ins. Co.*, 3 Allen, 362; *State Mut. Ins. Co. v. Roberts*, 7 Am. L. Reg. 229; *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391. This case overrules

*Traders' Ins. Co. v. Robert*, 9 Wend. 404, 474; *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. 570, 1 Seld. 405. The case of *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254, may, perhaps, be distinguished on the ground pointed out in the next note. In *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401, the action was brought by the mortgagee, to whom the policy had been assigned. The owner of the vessel procured the insurance upon her, the underwriter knowing at the time that the owner was indebted to the plaintiff for an engine furnished the vessel; that he was to mortgage the vessel to secure such debt; and that his object in obtaining the policy was to assign it as security for the debt. The policy contained permission to insure to the extent of \$40,000, and to assign the policy. Held, that an over-insurance by the owner after the policy was assigned was fatal to the recovery. But see *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Maine, 221.

the time of their assent to the transfer of the policy, impose any further obligations on the transferee, this may be evidence of a new contract with him; and then the acts of the mortgagor cannot affect his rights as transferee.<sup>1</sup> Courts are inclined, for obvious reasons, to go very far in giving to a transferee a right of action as on his own interest. We cannot but think, however, that they have construed the rules of the common law in regard to assignment very liberally, for this purpose.<sup>2</sup>

It is a well-settled rule of law that the assignee of a *chose in action* stands in the place of his assignor. He is liable to have set up against his claim all demands due from the assignor to the original promisor at the time of the assignment, but not subsequent ones. And after the assignment, the assignor is treated as having nothing to do with the contract, except that the action must generally be brought in his name. Notice of the assignment must be given to the original promisor.<sup>3</sup>

If notice is given of the assignment, and the insurers consent,

<sup>1</sup> *Foster v. Equitable M. F. Ins. Co.*, 2 Gray, 216. In this case the insurers required, at the time of their assent to the assignment, an agreement of the mortgagee to pay all assessments which should be made against the policy, and that the policy should be subject to the same lien for the payment of assessments as before. The court, per *Bigelow, J.*, said: "The legal effect of this transaction was to create a new, substantive, and distinct contract of insurance with the plaintiffs. They had a separate interest, as mortgagees, to be protected by the policy. For a new and independent consideration, the defendants agreed to insure this interest to the plaintiffs, and thereby the parties assumed toward each other the relation of insurer and insured."

<sup>2</sup> In *Edes v. Hamilton Ins. Co.*, 3 Allen, 362, *Bigelow, C. J.*, speaking of *Foster v. Equitable M. F. Ins. Co.*, cited in the preceding note, said: "The decision in that case, although fully warranted by the peculiar facts which were there shown

to exist, was nevertheless going as far as the rules of law will permit, in order to sustain a claim for loss under a policy which has been assigned by the original assured."

<sup>3</sup> *Comstock v. Farnum*, 2 Mass. 96; *Wood v. Partridge*, 11 Id. 488; *Jones v. Witter*, 13 Id. 304; *Jenkins v. Brewster*, 14 Id. 291; *Sweet v. Green*, 4 Greenl. 384; *Hackett v. Martin*, 8 Id. 77; *Bartlett v. Pearson*, 29 Maine, 9; *Sanborn v. Little*, 3 N. H. 539; *Dunclee v. Greenfield Steam Mill Co.*, 3 Foster, 245; *Raymond v. Squire*, 11 Johns. 47; *Anderson v. Van Alen*, 12 Id. 343; *Briggs v. Dorr*, 19 Id. 95; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Andrews v. Beecker*, Id. 411; *Wood v. Perry*, 1 Barb. 114, 131; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Guerrey v. Perryman*, 6 Ga. 119; *Norton v. Rose*, 2 Wash. Va. 233. These principles are applicable to the contract of insurance. *Rousset v. Ins. Co. of N. A.*, 1 Binn. 429; *Gourdon v. Ins. Co. of N. A.*, 3 Yeates, 327, 1 Binn. 430, n.

and give no notice to the assignee of existing claims held by them against the assignor, this, on general principles, should be held as a waiver of such claims.<sup>1</sup> ✓

If a person, acting in behalf of the owners of a vessel, effects insurance upon it in his own name on account of whom it may concern, and the policy is afterwards assigned, the assignee will take subject to such rights as existed between the owners and the underwriters.<sup>2</sup> In these cases of the assignment of the policy,

<sup>1</sup> *Mowry v. Todd*, 12 Mass. 281, 283; *King v. Fowler*, 16 Id. 397; *Henry v. Brown*, 19 Johns. 49; *Merrill v. Merrill*, 3 Greenl. 463; *Stiles v. Farrar*, 18 Vt. 444; *Wiggin v. Damrell*, 4 N. H. 69; *Thompson v. Emery*, 7 Foster, 269. See also *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. 350, 354. In *Gourdon v. Ins. Co. of N. A.*, 3 Yeates, 327, 1 Binn. 430, n., there was some evidence that notice of the assignment had been given to the insurers, and that they had assented thereto. *Shippen*, C. J., charged the jury as follows: "I take it to be likewise incumbent on the assignee of a policy to call upon the underwriter, and inform him before any account of a loss, and to know if he has anything to set off against the policy, in case a loss should happen. If the underwriter had this notice, and either makes no objection or claim, or is totally silent as to any claim, I should consider the assignee of the policy in the same condition as the assignee of a bond under the same circumstances, and that both are entitled to recover, notwithstanding the underwriter on the policy, or the obligor in the bond, should afterwards discover that they had a counter demand, and that their mouths are stopped by their acquiescence or silence, otherwise in both cases it would lead to a deception." But in *Mangles v. Dixon*, 3 H. L. Cas. 702, 18 Eng. L. & Eq. 82, it was held to be the duty of the assignee of a *chose in action* to inquire as to the equities aris-

ing upon it, and that the creator of the security was not bound on receiving a simple notice of the assignment to volunteer information, unless the note disclosed, on its face, that which should induce the belief that the assignee had been deceived in accepting the assignment.

In *Wiggin v. American Ins. Co.*, 18 Pick. 158, the policy contained the following clause: "In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted." The policy was assigned with the consent of the company, "reserving their rights expressed in the policy." This clause was held to give the company the right to deduct all claims due from the assignors, whether prior or subsequent to the assignment. But in the case of *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, it appearing that, by virtue of two policies made prior to the assignment, there was a loss due from the company to the assignors, the court held, that, as the company had a right, on the liquidation of those losses, to deduct all premium notes due to the office, as well those afterwards as those previously made, the company could only claim from the assignees the balance remaining, if any, after such deduction. See also *ante*, p. 49, n. 1. ✓

<sup>2</sup> *Waters v. Allen*, 5 Hill, 421.

the interest in the property insured remains in the original assured. The policy may, however, be made assignable with the subject of insurance; as when the loss is made payable to the insured, "or any other person who may be the owner at the time of the loss." In this case, a transfer of the property, and of the policy, gives the transferee all the rights of the party originally insured.<sup>1</sup>

The mere assignment, however, or sale of the property insured, gives no right to the assignee or purchaser to sue the insured for a subsequent loss of the property, but it will suffice to destroy the claim of the original insured, and thus wholly discharge the insurer. It is quite certain, both in England and the United States, that a common policy of insurance does not go to the assignee of the property insured, as an incident of the property, or in any way attached to it.<sup>2</sup> Emerigon states the law to be otherwise in France.<sup>3</sup> We consider it equally certain now that the original assured loses all interest in the policy, by such an assignment or transfer of the subject of insurance as takes from him all interest therein before a loss occurs. A question, however, has been made, whether, if an assured makes an assignment of the property insured, and therewith of the policy, and a loss subsequently occurs, the assignee has not acquired the right of the assured, and may not bring an action on the policy in the name of the assured, but for his own benefit. In the principal case, or at least the earliest in which an opinion to this effect is expressed, it was a mere *obitum dictum*.<sup>4</sup> Far more than its due weight was given to this opinion,

<sup>1</sup> Rogers v. Traders' Ins. Co., 6 Paige, Ch. 583.

<sup>2</sup> Powles v. Innes, 11 M. & W. 10. See also Godin v. London Assur. Co., 1 Burr. 489; Fogg v. Middlesex Mut. F. Ins. Co., 10 Cush. 337, 345; Tate v. Citizens' Mut. F. Ins. Co., 13 Gray, 79; King v. Preston, 11 La. Ann. 95.

<sup>3</sup> Emerigon, c. 16, § 3.

<sup>4</sup> Tindal, C. J., in the case of Sparkes v. Marshall, 2 Bing. N. C. 774, 3 Scott, 172, the facts of which it is unnecessary to state, says: "If the plaintiff had an insurable interest at the time the policy was effected, whatever change may have

taken place in the property in the oats since can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed. . . . We are not aware of any principle on which a change in the interest, after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss." This expression of opinion was entirely unnecessary to the decision of the case. In fact, there had been no transfer or change in the property at

or, as it might more properly be called, this doubt, in a subsequent case.<sup>1</sup> Such a view, however, seems to be favored in one case by the Supreme Court of the United States, and in a Pennsylvania case.<sup>2</sup> Judge Phillips inclines to the same view, provided the policy contained no provision to the contrary;<sup>3</sup> while Mr. Duer seems to avoid expressing an opinion upon the point.<sup>4</sup> Chancellor Kent expresses himself thus: "If the subject-matter of the property be assigned before loss, the policy may also be assigned, so as to give a right of action to a trustee for the assignee"; meaning, we suppose, by this that the assignee may bring an action in the name of the assignor for his own benefit, and the assignor will not be permitted to defeat or impair the assignee's right of action. He adds, that in the declaration in such a suit the plaintiff may aver that he sues as a mere trustee, and that the whole interest is in others.<sup>5</sup>

These are very high authorities, but nevertheless we cannot regard this as a just view of the law on this subject. We think that some confusion has arisen from confounding the assignability of the policy itself, where there is no assignment of the subject, with the case where both policy and subject are assigned. The assignment of the policy alone stands upon the ordinary ground of an assignment of a *chose in action*. The assignment of the subject, however, raises a very different question. The contract of insurance is strictly a personal one. It cannot properly be called insuring the thing, for there is no possibility of doing it, and it therefore must mean insuring the person from damage.<sup>6</sup> It is not an engagement to insure property from loss irrespective

all, only an assignment of the policy after a loss.

<sup>1</sup> *Powles v. Innes*, 11 M. & W. 10. In this case insurance had been effected for two or three part-owners. Before a loss one part-owner transferred his share to the uninsured part-owner. There was no transfer of the policy. It was held that the policy did not pass as incident to the property, and hence that there could be no recovery in the name of the assignors. But it was intimated by *Parke, B.*, that "if the policy had been handed over with the bill of sale, or there had been an order to the bro-

kers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser."

<sup>2</sup> It seems to have been taken for granted, in *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, and in *Rousset v. Ins. Co. of North America*, 1 Binn. 429, that the insurers would be liable in such cases.

<sup>3</sup> 1 Phillips on Insurance, §§ 77, 88.

<sup>4</sup> 2 Duer on Ins. 54.

<sup>5</sup> 3 Kent's Com. 261.

<sup>6</sup> Per Lord *Hardwicke*, in *Sadlers' Co. v. Badcock*, 2 Atk. 554, 556.



of ownership, but to answer for losses occurring to a certain person, upon a certain subject. Where the interest of the assured ceases, the policy becomes inoperative for want of a subject belonging to the assured to operate upon. If at the time of the assignment of the policy, and of the subject of insurance, there is an agreement on the part of the assignor to bear the risk, an insurable interest would remain in the original assured, and the policy would be sustained by that interest, and made available to the assignee. Certainly it could never be maintained that an insurance would be made good to the assignee of both subject and policy, where a change of possession followed a transfer of title. The character of the person having the control of the property would be held, in such a case, to be a material element in the risk. Where, however, the transfer of property does not in any way affect the risk, the great technical difficulty remains, that the underwriters have engaged to insure against loss the original assured, and not his assignee. It is difficult to perceive upon what principles the opposite view can be supported. The view that we take of the subject seems to us to be supported, not only by the better reason, but by the weight of authority. A man who has sold property insured, and received its equivalent in the price, cannot be said to suffer when the property is destroyed, nor can the purchaser avail himself of the insurance, because no contract was made with him, unless the insurer assents to the transfer, and agrees to continue his liability,<sup>1</sup> but subject perhaps to the revival of his obligations, if the property returns to the original insured before the loss,<sup>2</sup> but

<sup>1</sup> Per *Parker, C. J.*, in *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 Pick. 249, 258. See also *Sadlers' Co. v. Badcock*, 2 Atk. 554; *Lynch v. Dalzell*, 4 Brown, P. C. 431; *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515, per *Parker, C. J.*; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76, 81; *Wilson v. Hill*, 3 Met. 66; *Bell v. Firemen's Ins. Co.*, 3 Rob. La. 423, 427; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Franklin Fire Ins. Co. v. Findlay*, 6 Whart. 483, 498, per *Kennedy, J.*; *Macarty v. Com. Ins. Co.*, 17 La. 365.

<sup>2</sup> In *Power v. Ocean Ins. Co.*, 19 La.

28, the policy contained the clause that, in case of the transfer of the property, and the termination of the interest of the insured, the policy should be void. It was held that if the property was sold, but reverted to the original insured, so that he was in possession at the time of the loss, the underwriters were liable. The point seems to have been taken for granted to be settled the other way in *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148. After the policy was made the boat was seized on execution and sold; but the defendants verbally agreed to waive the forfeiture if the

not to make the insurer liable for losses occurring while the property was out of the hands of the original insured. And if two are jointly insured, and one sells out to the other, no action can be maintained by the vendee in his own name, unless the policy is assigned to him with the assent of the insurer.<sup>1</sup>

An insured may sell the property, it is said, and agree to retain it as the trustee of the purchaser, and then may hold the policy for his benefit.<sup>2</sup> But this rule must be limited to the case where the agreement gives the original insured an insurable interest in the thing sold.<sup>3</sup> And if the sale be conditional, the seller may still hold the policy for his own interest, as mortgagor, or the like, provided he remains in possession, and no entry is made for foreclosure.<sup>4</sup> It has, however, been held that a mortgage is a material alteration in the ownership of the property insured.<sup>5</sup>

boat should come into the possession of the plaintiff before the termination of the risk. The plaintiff then bought her, and held her at the time of the loss. Held, that the agreement was not binding, and the defendants were not liable. If the transfer makes the policy merely inoperative and not void, there seems to be no reason why the policy, in the absence of an express stipulation, may not revive in case of a re-purchase, unless the risk had been changed. See the remarks of *Bronson*, C. J., in *Howard v. Albany Ins. Co.*, 3 Denio, 301, 303.

<sup>1</sup> *Tate v. Citizens' Mut. F. Ins. Co.*, 13 Gray, 79.

<sup>2</sup> *Powles v. Innes*, 11 M. & W. 10, per *Parke*, B., and *Abinger*, C. B.

<sup>3</sup> See *Reed v. Cole*, 3 Burr. 1512.

<sup>4</sup> *Stetson v. Mass. Mut. F. Ins. Co.*, 4 Mass. 330; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76, 81; *Jackson v. Mass. Mut. F. Ins. Co.*, 23 Pick. 418; *Higginson v. Dall*, 18 Mass. 96; *Rice v. Tower*, 1 Gray, 426; *Holbrook v. Am. Ins. Co.*, 1 Curtis, C. C.

193; *Rollins v. Col. Ins. Co.*, 5 Foster, 200; *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 10 Foster, 231. In Vermont it seems to be doubted whether a mere mortgage would not be an alienation. *Tittmore v. Vermont Mut. F. Ins. Co.*, 20 Vt. 546. In Indiana it is held to be an alienation. *M'Culloch v. Indiana Mut. F. Ins. Co.*, 8 Blackf. 50; *Indiana Mut. F. Ins. Co. v. Coquillard*, 2 Cart. Ind. 645. But it seems well settled, both on principle and on authority, that it is not. See cases *supra*; also *Bell v. Western M. & F. Ins. Co.*, 5 Rob. La. 423; *Hibbert v. Carter*, 1 T. R. 745; *Alston v. Campbell*, 4 Brown P. C. 476; *Reed v. Cole*, 3 Burr. 1512; *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Maine, 221. In *McLaren v. Hartford F. Ins. Co.*, 1 Seld. 151, it was held that the interest of the mortgagor is gone after a sale of the mortgaged premises by a master in chancery under a decree of foreclosure, and payment of part of the purchase-money, although the decree was not enrolled, and no deed executed by the master at the time of the sale. But in *Bragg v. New*

<sup>5</sup> *Edwards v. Mut. Ins. Co.*, 1 Allen, 311.



✓ The insurers have the right of personal selection ; they may be willing to insure for one person and not for another ; and therefore the usual clause, that the policy shall be void if assigned without their consent, is certainly valid,<sup>1</sup> whatever may be the right of transfer in the absence of this clause.<sup>2</sup> Where the property insured was sold to A, and the following order was indorsed on the policy, " Pay under the within policy to A," and this was signed by the insured, it was held that, although the subsequent acts of the insurers might amount to an assent to the order, yet that the order did not amount to an assignment, and that the sale of the property to A without the consent of the insurer avoided the policy.<sup>3</sup> But it seems that this clause does not apply to a case of bankruptcy or insolvency,<sup>4</sup> whether the property and policy were taken out of the hands of the insured by force or act of law, or by his own voluntary assignment in trust for creditors.<sup>5</sup> And

England Mut. F. Ins. Co., 5 Foster, 289, where the insurance was in the name of the mortgagor, but the defendants had agreed by a memorandum on the policy to pay the loss to the mortgagee, it was held that a subsequent foreclosure did not work an alienation. In *Morrison v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262, A effected insurance on certain property, and then sold it to B, who re-conveyed it to a trustee to secure to A the payment of the purchase-money. It was held that A still retained an insurable interest, and might recover on the policy to the extent of his actual loss. But if A conveys part of the premises to B, and then takes back a lease of the same for five years at a nominal rent, this is an alienation. *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254. In *Abbott v. Hampden Mut. F. Ins. Co.*, 30 Maine, 414, where the policy declared that an alienation in whole or in part should avoid the policy, a *feme covert* was tenant for life in one third of a lot of land, and tenant for a term of years in the rest. Her husband erected a house on the land, and

caused it to be insured as his property. The husband and wife then conveyed to the reversioner the life estate of the wife on condition that he should pay her a fixed sum annually during her life. The husband, at the same time, conveyed all his interest in the estate for years, and took back a mortgage upon the whole lot to secure the payment of several sums in yearly instalments. The mortgagor entered into possession. The house was destroyed before any of the sums became payable. Held, that the conveyances amounted to an alienation.

<sup>1</sup> *Lazarus v. Comm. Ins. Co.*, 5 Pick. 76, 81, and cases cited in the preceding notes.

<sup>2</sup> See *supra*, pp. 56, 57, 58, and cases there cited.

<sup>3</sup> *Minturn v. Manuf. Ins. Co.*, 10 Gray, 501.

<sup>4</sup> But see, *contra*, *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Maine, 292; *Loring v. Eagle Ins. Co.*, 14 Gray, 150.

<sup>5</sup> An ordinary assignment for the benefit of creditors constitutes the assignees agents, as it were, of the assignors. *Adams on Equity*, 31. Such a trans-

it has been held that a mere agreement between the owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although the policy is on condition that the insurance shall be void "in case of any sale, transfer, or change of title."<sup>1</sup>

Whether a sale and transfer, by one partner to another, of his interest in insured property belonging to the firm, is an alienation which discharges the insurers, may not be certain on the authorities; but we think that the principles of insurance law lead clearly to this conclusion.<sup>2</sup> It has been recently decided in

fer would not destroy the interest of the original insured, and hence such an assignment would not work an alienation. *Gourdon v. Ins. Co. of N. A.*, 3 Yeates, 327, 1 Binn. 430, note; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81. But where the assignment was made on the condition that the creditors, for whose use it should be made, should release and discharge the debts, and they were so released and discharged, it was held that the whole interest of the insured in the property was gone. *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76. See also *Dadmun Manuf. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. 429.

<sup>1</sup> *Orrell v. Hampden Ins. Co.*, 13 Gray, 431.

<sup>2</sup> This question has been much discussed in New York, and the cases are to some extent irreconcilable. It is well settled that if A & B are joint-owners, or partners, and A sells out his interest to B, no action can be brought in the names of A & B for B's benefit. *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210; *Howard v. Albany Ins. Co.*, 3 Denio, 301; *Ferriss v. North America F. Ins. Co.*, 1 Hill, 71; *Tillou v. Kingston Mut. Ins. Co.*, 1 Seld. 405, reversing same case in the Supreme

Court, 7 Barb. 570. See also *McMasters v. Westchester Co. Mut. Ins. Co.*, 25 Wend. 379. In many of these cases it was directly asserted that such a transfer works an alienation. It is to be observed, however, that there is now a statute in New York which provides that assignees must sue in their own names, and that formerly, to some extent, the acts, under which the insurance companies were incorporated, contained a similar provision. It may therefore, perhaps, be that these cases were decided on this point, and that the expressions of opinion as to the question of partnership are to be regarded as mere *dicta*. For it has been held, that where A & B are partners, and effect insurance, and A sells out to B, and after a loss B assigns the claim to C, that C may sue in his own name. *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. 511. And in *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623, it was held, that where A & B were partners and effected an insurance, and afterwards A sold out his interest to B and C, the policy was made null and void; the court said: "If this assignment had simply been from one of the assured to the other, they being partners, it would not, for the reasons stated by *Roosevelt, J.*, in *Wilson v. Genesee Mut. Ins. Co.*,

Pennsylvania that, where A and B were insured as partners, and A sold out to B, no action would lie in the name of A and B for the benefit of B.<sup>1</sup> And, in general, upon the death of the insured, the policy will go with the property insured, either to a legatee or the next of kin, and will be held by the executor or administrator as a trustee until distribution;<sup>2</sup> nor will this clause prevent the

16 Barb. 511, have affected the policy. But as it is, the company are called upon to litigate with a party with whom they had not contracted, and which their policy protected them against." In Tennessee it is held that if two partners effect insurance, and one sells out to the other, an action in the name of both will lie to recover the original share of the vendee, but the interest of the vendor cannot be recovered. *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444. In *Dreher v. Ætna Ins. Co.*, 18 Mo. 128, it was held that a dissolution of partnership before loss, and a division of the goods, so that each partner owned a distinct portion, was a change of title within the meaning of the clause, "any transfer or change of title in the property insured shall avoid the policy."

The argument used in favor of not considering the sale by one partner to another as an alienation, is chiefly that no new party is introduced into the contract, and as the insurer was willing to trust the partnership, and to insure their property, he is not prejudiced in any way by such a sale. But the answer to this is obvious. The presence of one or more particular persons in the firm may be the reason why the insurer was willing to take the risk. He may have said, "A is an honest, trustworthy man, the other members of the firm I have my doubts about, but as long as A remains in the firm I am willing to trust it." Can it be said, then, that if A sells out to B and C, the insurer is not prejudiced? Again, if one partner sells out

to the others, the partnership is by operation of law dissolved; and, admitting that the insurer did not, as in the case just supposed, rely upon one partner, yet it must then be said that he insured the firm, and as this has ceased to exist, he is no longer liable. On principle, if A & B are insured, and A assigns his interest to B, no action should lie in the name of A & B, for A has no interest, and the assignment has not been by consent, which is the evidence of a new contract by the insurer to pay the loss; and, except in New York, an assignee cannot sue in his own name.

<sup>1</sup> *Finley v. Lycoming Co. Mut. Ins. Co.*, 30 Penn. State, 311. The policy in this case contained the clause that if the property "shall be alienated by sale or otherwise, the policy shall be void."

<sup>2</sup> If the insured dies intestate, his death works no alienation, because his heirs take by descent, and not by any act of his. *Burbank v. Rockingham M. F. Ins. Co.*, 4 Foster, 550. The question has arisen whether, in case of a devise of real estate, the policy goes to the devisee, or to the administrator as personal estate. The latter seems to be the more correct view. This is shown by the case of *Haxall v. Shippen*, 10 Leigh, 536. The testator insured his house against fire by a policy to himself, his heirs, and assigns. He then devised the tenement to his wife for life, remainder to his two daughters in fee. After his death the house was destroyed by fire. The wife received the money, and, without the concurrence of the other de-

insured from making a valid assignment of his claim after a loss has happened.<sup>1</sup> But whether the parties may, if they see fit, stipulate that such an assignment shall invalidate the policy, is, on the authorities, a matter of doubt.<sup>2</sup>

If the property insured is admitted to have been owned by the insured when the policy was issued, the burden of proof is upon the insurer to show a subsequent alienation of the property, although generally the burden of proof is on the insured to show that at the time of the loss he had an insurable interest in the property covered by the policy.<sup>3</sup>

The policy may provide that not only must the insurers be notified of a change of ownership, but that they must be informed of a change of masters. And if the vessel, in such a case, is lost while under the charge of a master, of whose appointment the insurers have not been informed, the insured cannot recover, although it does not appear that there was any negligence on the part of such captain.<sup>4</sup>

vises, expended it in a new house. She then died, leaving the new house standing, which went with the estate to the devisees in remainder. Held, that the tenant for life had a right only to the use of the money during her life, it being but personal estate, and that she had no right to convert it into real estate, and that on her death the husbands of the devisees in remainder had a right to call for the whole insurance money, without any deduction being made for the value of the new building. But in cases where a trust existed, or was presumed to exist, the proceeds have been considered, not as personal estate, but as "affected with a trust for the benefit of the parties interested in the real estate." *Parry v. Ashley*, 3 Sim. 97; *Norris v. Harrison*, 2 Madd. Ch. 268. See also *Mildmay v. Folgham*, 3 Ves. 471.

<sup>1</sup> *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Brichta v. N. Y. La Fayette Ins. Co.*, 2 Hall, 372; *Dadmun Manuf. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. 429, 435; *Mellen v. Hamilton F. Ins. Co.*, 5 Duer, 101.

<sup>2</sup> In *Goit v. National Protection Ins. Co.*, 25 Barb. 189, decided in April, 1855, this question came before the Supreme Court of New York, *Allen, J., Pratt, J., Hubbard, J., and Bacon, J.*, being upon the bench, and it was held that the clause, so far as it affected the right of the assured to transfer his interest after a loss, was void as against public policy. In March, 1857, the same question came before the same court, *Strong, J., Welles, J., and Smith, J.*, being upon the bench, and the clause was held to be valid, no notice being taken of the preceding case. *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623. It will appear, from the numbers of the volumes above cited, that the case of 1857, which held this clause to be valid, was published some time before the case in 1855, which declared it to be void.

<sup>3</sup> *Orrell v. Hampden Ins. Co.*, 13 Gray, 431.

<sup>4</sup> *Tennessee Marine & Fire Ins. Co. v. Scott*, 14 Mo. 46.

## CHAPTER IV.

## ON CONSTRUCTION.

SECTION I. — *What is subject to Construction.*

THE construction of mercantile contracts is always important and sometimes difficult; and there is no class of contracts which have given rise to more questions of construction, and have caused more litigation on this ground, than policies of insurance. They were originally bargains between merchants, and there is no reason to suppose that they were written under professional advice; and they certainly were not written with technical accuracy.<sup>1</sup> It has been often remarked, that if read for the first time, and without the aid of custom or adjudication, their meaning and purpose could hardly be discovered.<sup>2</sup> Much of their language has been repeated for several generations; and of many of the phrases the meaning and effect are fully determined by adjudication.<sup>3</sup> But

<sup>1</sup> "Policies of insurance are generally the most informal instruments which are brought into courts of justice." C. J. *Marshall*, *Yeaton v. Fry*, 5 Cranch, 842. *Lawrence, J.*, *Marsden v. Reid*, 3 East. 579: "It is wonderful, considering how much property is at stake upon instruments of this description, that they should be drawn up with so much laxity as they are." And see per Lord *Mansfield*, *Wilson v. Smith*, 3 Burr. 1550, Park, 246; *Maryland Ins. Co. v. Woods*, 6 Cranch, 45. "The contract of insurance is certainly very loosely drawn." See *Buller, J.*, in *Brough v. Whitmore*, 4 T. R. 210, "an absurd and incoherent instrument." *Relly v. Royal Ex. Ass. Co.*, 1 Burr. 347. The instrument is conceived in an ancient and inaccurate form of words. See also opinion of *Story, J.*, *Palmer v. Warren Ins. Co.*, 1

*Story*, 365; *Symond v. Boydell*, Dougl. 270, Lord *Mansfield*. The ancient form of a policy of insurance which is still retained is, in itself, very inaccurate. And per *Dutton, J.*, *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 81 Com. 826.

<sup>2</sup> Lord *Kenyon*, in *Brough v. Whitmore*, 4 Term R. 208, said: "It was said many years ago that if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been had on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible."

<sup>3</sup> Lord *Mansfield*, in *Relly v. Royal Ex. Ass. Co.*, 1 Burr. 347: "From the nature, object, and utility of this kind of contract, consequences have been drawn and a system of construction es-

changes in this phraseology are continually made to meet the varying needs of commerce, and every new phrase gives rise to new questions.

*Words Printed or Written.*

All our policies are in part printed and in part written. What is printed is supposed to belong to all policies, or at least to all the policies issued by the underwriters who use that form. What is written expresses the particulars of that individual bargain. From this follows one obvious rule: that if what is written conflicts with what is printed, it controls what is printed. The reason is obvious; for what is written contains the particulars of that very contract, and may be supposed to come under especial consideration.<sup>1</sup>

tablished." But length of time, and a variety of discussions and decisions, have reduced it to a certainty. By Lord *Mansfield*, in *Symond v. Boydell*, Doug. 270. See also *Maryl. Ins. Co. v. Woods*, 6 Cranch, 45. In *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 111, the court say: "It has been often said that the contract of insurance is obscure in its terms, but that by a course of judicial decisions it has been rendered sufficiently certain to answer the valuable purposes for which it was made. The construction which has from time to time been given by courts in judicial decisions, and the ordinances of commercial countries, and the known usages touching this contract, have been introduced and considered as part of the law merchant of the civilized world, and we are not disposed to narrow the view." And in *Gordon v. Little*, 8 S. & R. 562, Mr. Justice *Gibson* said: "The relaxation of the common-law rules of evidence, in the case of a policy, arises from the clumsiness of the instrument, which has undergone little or no alteration since it came into use; although the ever-varying circumstances of trade have pro-

duced a variety of corresponding modifications of its obligation, which is often independent of its terms."

<sup>1</sup> Lord *Ellenborough*, in *Robertson et al. v. French*, 4 East, 136, says: "The only difference between policies of insurance and other instruments in this respect is, that, the greater part of the printed language of policies of assurance being invariable and uniform, has acquired from use and practice a known and definite meaning, and the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." See 2 *Parsons, Contr.* (5th ed.) 516, and 1 *Greenl. Ev.*



It is the parts which are written which give rise to the vastly larger number of questions of construction. They have not usually the advantage of ancient usage, or of definite adjudication. They express the meaning of the parties in such words as occurred to them, and as seemed at the time sufficient; but when a loss occurs these words are often found to admit of more than one construction, and to be of doubtful meaning.

It must always be remembered that construction does not come in, unless it be made necessary by obscurity or uncertainty.<sup>1</sup>

§ 278. See also Emerigon, c. 2, § 3, vol. 1, p. 33; *Wallace v. Ins. Co.*, 4 La. 289; *Cushman v. Northwestern Ins. Co.*, 34 Maine, 487; *Alsager v. St. Katherine's Dock Co.*, 14 M. & W. 794, 799; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 394; *Howland v. Comm. Ins. Co.*, Anthon, N. R. 26. In *Goicoechea v. La. State Ins. Co.*, 18 Mart. La. 51, 55, *Porter, J.*, said: "The rule invoked by this argument, that the written parts of the policy should control those that are printed, is correct, because the written words are the immediate language and terms stated by the parties themselves for the expression of their meaning, and the printed ones a general formula made for all cases that may be presented. But the rule cannot properly receive an application in cases other than those where the written and printed words so contradict each other that the one must yield to the other." In *Hunter v. General Mutual Ins. Co.* of N. Y. 11 La. Ann. 139, a number of slaves were insured by a written clause, "solely against loss by drowning in consequence of the stranding or shipwreck of the vessel, the assurers being warranted against all other risks." There was a printed clause in the policy authorizing the recovery of a general average contribution. It was held that the two clauses would stand together, because "a liability for a general average

contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule, that no one should enrich himself at another's expense; but it is not itself a risk, according to any proper interpretation of that term." See also *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Coster v. Phoenix Ins. Co.*, 2 Wash. C. C. 51; per *Oakley, C. J.*, in *Weisser v. Maitland*, 3 Sandf. 322; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. 385; *De Longuemare v. The Tradesmen's Ins. Co.*, 2 Hall, 622; 1 Emerig. 34. "Il est permis de déroger aux clauses imprimées, et on est censé y déroger, par cela seul que les clauses écrites à la main y sont contraires." *Bargett v. Orient Ins. Co.*, 3 Bosw. (N. Y.) 385. But if the whole contract can be construed together, so that the written words and those printed make an intelligible contract, this construction should be adopted. 2 Pars. Contr. (5th ed.) 516, and cases cited; 1 Emer. 34.

<sup>1</sup> This is but a development of the maxim that, "Ubi in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est," with which the rule adopted by Emerigon from Vattel perfectly corresponds: "Qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation." 1 Emerig. c. 1, § 7, p. 59. Vattel further re-

Wherever words can mean but one thing, they may give rise to many questions, as of mistake, fraud, or the like ; but they do not raise a question of construction.

The general principles or rules which determine all construction are as applicable to contracts of insurance as to all other contracts. Some of them, however, have been considered with peculiar frequency in cases of insurance.<sup>1</sup>

## SECTION II. — *Which Party shall be favored by Construction.*

ONE question, which perhaps lies at the basis of all, is this, Which of the two parties shall the court be disposed to favor? In our introductory remarks, in speaking of the fluctuation which has characterized the jurisprudence of England and of this country in this respect, we have said that at one time courts have appeared to think that merchants who paid their premium were entitled to indemnity in case of loss, without any critical examination of the words of the bargain. In an early case approved by Lord Mansfield it is held, that, in the construction of policies, the "*strictum jus* or *apex juris* is not to be laid hold on ; but they are to be construed *largely for the benefit of trade.*"<sup>2</sup>

It is said by Mr. Duer that the rule of liberal construction thus laid down has since been invariably followed. But the same writer adds, whether it has not in some cases been carried too far, so as to substitute a presumed intent for that expressed by the words of the policy, may perhaps be reasonably doubted. We should, however, have great doubts whether this rule of liberal construction has been invariably followed ; it has certainly been modified and restrained in recent cases, by a disposition to treat

marks: "When a deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once admitted, there will be

no deed which it will not render useless."

<sup>1</sup> See the language of Lord *Ellenborough* (Note 8), in *Robertson v. French*, 4 East, 135. See also *Truman v. Loder*, 11 Ad. & E. 600, and the remarks of *Kent, J.*, in *Goix v. Low*, 1 Johns. Cas. 341 ; *Mumford v. Hallett*, 1 Johns. 430.

<sup>2</sup> *Relly v. Royal Ex. Ass. Co.*, 1 Burr. 349.



these contracts like all other contracts, — in such a way as shall do equal justice to all interested.<sup>1</sup> In the passage above quoted, the phrases “for the benefit of trade,” and “of the insured,” are used as though they were convertible terms, or as if the interests of trade required that, in the construction of policies of insurance, the insured should always be protected against the insurers. A much juster view prevails, we think, at present. It is seen that, if the insured should be protected against nice and technical

<sup>1</sup> *Graves & Scriber v. Marine Ins. Co.*, 2 Caines, 339; *Richards v. Marine Ins. Co.*, 3 Johns. 307. In this case the action was on the policy of insurance on goods “laden or to be laden on board the schooner Beaver, &c., from Nevitas, in the island of Cuba, to New York, beginning the adventure, &c., from and immediately following the loading thereof on board of the said vessel at Nevitas in Cuba.” The vessel sailed from New York with a cargo of flour, lard, &c. She arrived at Nevitas, but was permitted to sell only a small part of her cargo, and she sailed again from Nevitas for Jamaica with the principal part of the outward cargo on board, and while proceeding to that place was lost by perils of the sea. Held, that the policy did not attach to the outward cargo which continued on board the Nevitas, and was lost, and that the insured could only recover back the premium he had paid. The court affirms the case of *Graves & Scriber v. Marine Ins. Co.*

In *Hood v. Manhattan Fire Ins. Co.*, 1 Kern. 532, *Parker, J.*, remarked: “Although it is said that policies of insurance are to be construed liberally for the insured, yet where the words are not ambiguous, and the expression of the intent of the parties is full, I know of no reason why they should be excepted from the general rules of law applicable to the construction of all contracts.” And Lord *Ellenborough*, in *Robertson*

*v. French*, 4 East, 130, 135, is still more explicit. He says: “In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments, and in all other cases; it is, therefore, proper to state, upon this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or, unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense.” 2 *Pars. Contr.* (5th ed.) 357; *Merrill v. Boylston F. & M. Ins. Co.*, 3 Allen, 247; *Jordan et al. v. Warren Ins. Co.*, 1 Story, 342; *Aquilar v. Rodgers*, 7 T. R. 421; *Mumford v. Hallett*, 1 Johns. 433; *Graves v. Boston Ins. Co.*, 2 Cranch, 419; *Grant v. Paxton*, 1 Taunt. 463; *Honnick v. Phoenix Ins. Co.*, 22 Mo. 82.

defences on the part of the insurers, the insurers should be protected against opening the words used, to such an extent as to hold them to obligations and liabilities, which were not contemplated by the parties when the bargain was made, and are not included within any just and impartial construction of the words in which it was expressed.

One of the rules of construction has been, we think, pressed quite too far in favor of the insured; it is, that every contract shall be construed *contra proferentem*. The reason of the rule is, that he who proffers a contract writes it as he pleases, and uses such words as he thinks sufficient to express his purpose. If then they are insufficient for this purpose, it is his fault. And if they are open to the charge of ambiguity, he who receives the writing has a right to understand it in any of the senses in which it may be fairly and reasonably understood.<sup>1</sup>

We have always thought this rule useful only in cases to which the reason of it was strictly applicable; as when one party wrote from his own mind the whole contract, and the other party had

<sup>1</sup> "It is to be noted," says Lord Bacon, "that this rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred, and it is in this particular very notable to consider, that this being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules which are of more equity and humanity." Bacon's Max. Reg. 3. See also Love v. Pares, 13 East, 80; Doe v. Dodd, 5 B. & Ad. 689; Adams v. Warner, 23 Vt. 411. There are good reasons for saying that the rule of *contra proferentem* would apply to this extent, that where either party proposes and inserts especial phrases or provisions, and these are found to be ambiguous,

and they must be construed either for or against the proposer, he must be satisfied with the construction which is unfavorable to him, because it is his own fault that the words he used did not express his purpose and intention more plainly. See Blackett v. Royal Ex. Ass. Co., 2 Crompt. & Jerv. 244, 251, 2 Tyr. 266; Audley v. Duff, 2 B. & D. 111; Donnell v. Columbian Ins. Co., 2 Sumner, 366, 381; Palmer v. Warren Ins. Co., 1 Story, 360, 364; Louisville Mar. & F. Ins. Co. v. Bland, 9 Dana, 143, 151; Ætna Ins. Co. v. Jackson, 16 B. Mon. 242; Grant v. Lexington F., L., & M. Ins. Co., 5 Ind. 23; Western Ins. Co. v. Cropper, 32 Penn. St. 351. See also Shep. Touchst. 100; Earl of Cardigan v. Armitage, 2 B. & C. 207; Bullen v. Denning, 5 B. & C. 847, 850, 851. It is to be noticed that most of these cases apply the rule *contra proferentem* in regard to exceptions. Such is the case in 2 Crompt. & J.

• nothing to do but to receive or reject it. Almost the very opposite of this takes place usually when a policy of insurance is written. When the blanks are to be filled with a description of the ship, or other property on the voyage, or the risks, or the liberties and permissions required by the insured, he usually states them to the insurer orally or in writing, in the words which he wishes to be used.<sup>1</sup> If the insurer objects, a negotiation may ensue; and the words finally adopted, are the result of an agreement.<sup>2</sup> It is difficult to see how these words can be regarded as any more the words of the insurer than of the assured, or that one party should be required to suffer the consequences of ambiguity, on the ground that it is his fault, any more than the other party.

It is true that the eminent judges who have pressed this rule against the insurers, have in some measure confined it to what are called exceptions;<sup>3</sup> and these, we shall hereafter see, are words

<sup>1</sup> See per *Marshall*, C. J., in *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. 638: "In making marine policies, the insurer is in general wholly dependent upon the statements of the insured with regard to the property and the risk." In *De Longuemere v. Tradesmen's Ins. Co.*, 2 Hall, 609 and 610, where *Jones*, C. J., remarks: "Both the survey and the report are ordinarily the acts of the agents of the insurers, and the statements they contain are the results of the inspection and inquiry of those agents, and not the representations of the assured. His statements are made in his application for insurance, but upon these the insurers, where the premises are accessible to their own surveyor, seldom act." But this must be confined to contracts made under that usage, and to the part of the contract which is affected by it, as is in fact admitted in the same case by *Oakley*, J. See Id. 629.

<sup>2</sup> See remarks of *Walworth*, Chanc., in *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill, 340, 341.

<sup>3</sup> The decision in the case of *Dow v.*

*Whetten*, 1 Hall, 174, relied on by Mr. Duer in support of his statement that, "as a contract of indemnity to the assured, the policy is to be liberally construed in his favor," &c., is reversed by the Court of Errors. 8 Wend. 160. The case of *Tierney v. Etherington*, at Guildhall, 5th March, 1748, relied on by Duer, and on which Lord *Mansfield* based his decision in *Relly v. Royal Ex. Ass. Co.*, 1 Burr. 341, and of which the reported extracts are not full, would seem to be stronger in its *obiter dicta* than its decisions. Thus it is said by *Lee*, C. J.: "It is certain that, in construction of policies, the *strictum jus* or *apex juris* is not to be laid hold on; but they are to be construed largely for the benefit of trade, and *for the insured*." And what the case really *decides* is comprised in this: "When the *end* is insured, the usual *means of attaining it* are not meant to be excluded."

The agreement was: "That, upon the arrival of the ship at Gibraltar, the goods might be *unloaded* and *reshipped* in one or more British ship or ships for England or Holland," &c. It appeared,

which qualify or limit previous permissions or engagements. There may be some reason for regarding these as suggested by the insurers, and as inserted for their protection ; but even these, like the other written words, are the result of negotiation and arrangement. Judge Story, who in one case laid down the rule of *contra proferentem*, in another case speaks of it as "a mere technical rule of construction."<sup>1</sup>

Upon the whole, we are convinced that the true rule of construction, and we think we may add, the present practice of courts, both of England and this country, is to do equal justice to both parties, without favor to either.

### SECTION III. — *Intention of the Parties.*

THE cases are very numerous in which the intention of the parties is referred to as determining the construction.<sup>2</sup> And from

in evidence, that when the ship came to Gibraltar, the goods were unloaded, and put into a store-ship (which it was proved was always considered as a warehouse), and that there was then no British ship there. And this appeared to be the usual method of unloading and reshipping in that place, viz. : "That when there is no British ship there, then the goods are kept in store-ships."

Here the facts were these, that a usual custom was allowed to form a portion of the contract. This is all that was decided, and the language of the learned Chief Justice seems to us to be much broader, and to go far beyond the requirements of the case or the actual decision.

The case in 1 Story, 360, is one of exceptions also. And so is that of Yeaton v. Fry, 5 Cranch, 335. Neither does Mr. Marshall's statement (1 Marsh. Ins. 211) seem justified by that case, that "the words of the above clause"

(in the decision of Lee, C. J.) "show that the risk on goods, in English policies, like foreign ones, continues till they are 'discharged and safely landed' at the port of delivery."

The case decides merely that, where it was customary to store goods in a certain way, they are covered by the policy while so stored.

<sup>1</sup> Palmer v. Warren Ins. Co., 1 Story C. C. 360.

<sup>2</sup> The true meaning, the actual intention of the parties, is the controlling principle from which all the special rules of interpretation flow, and to which they are all subsidiary and subordinate. Maryland Ins. Co. v. Bossiere, 9 G. & Johns. 121 ; Arn. Ins. 64 ; per Story, J., in Schooner Reeside, 2 Sumn. 569 ; opinion of Lewis, J., in Joix v. Low, 1 John. Cas. 347. All contracts are to be construed according to the intent of the contracting parties, so as to give complete effect to such intent, if it may be done consistent with the rules,

some of them, it might almost be inferred, that this alone being ascertained, nothing more was to be considered. There is, however, always a danger in pressing this rule too far. It must not be forgotten that the question is, What is the proper construction of a written instrument? that is to say, of the words which the parties have used to express their bargain. And, however clear it may be that they agreed in a certain intent or understanding, if the words are not found, when fairly and rationally considered, to express that intent, then it is certain that the bargain they wrote is not the same with the bargain they made in fact. This may be a good reason for setting the written bargain aside as a mistaken one; but it would seem to be a very inadequate reason for first setting the written bargain aside, and then substituting by construction a bargain which they intended to write and did not write, in the place of that which they did write and did not intend to write.

The inquiry, as to the intent of the parties, must therefore always be an inquiry as to their expressed intention.<sup>1</sup> In other

of law. The contract of insurance is to be most liberally expounded for the attainment of this end. *Palmer v. Warren Ins. Co.*, 1 Story, 364, 365. The principle of construing according to the intention applies to other instruments as well as policies. "There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties." *Marshall, C. J.*, in *Cooke v. Graham*, 3 Cranch, 235.

<sup>1</sup> "Whenever," says *Willis, C. J.*, in *Parkhurst v. Smith*, Willes, 332, "it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, What was the intention of the parties? If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed as will best answer the intention

of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit, that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them."

This rule is well expounded by Lord Chief Justice *Eyre*, in the opinion delivered by him before the House of Lords in the great case of *Gibson v. Minot*, 1 H. Bl. 569 – 625. The question had arisen in that case, whether a bill of exchange drawn payable to a fictitious payee, and purporting to be by him indorsed, could be construed as a bill payable to bearer. A majority of the judges who delivered opinions agreed in favor of such a construction, and urged, among other arguments, the case of deeds of conveyance, which are frequently made to op-

words, it must be an inquiry, which of the meanings which the words fairly admit was in the minds of the parties when they used those words.

erate in a manner different from what the parties intended. But the learned Chief Baron delivered a very powerful opinion against adopting the construction in question. After noticing the argument derived from deeds of conveyance, and urging that there was no analogy between them and bills of exchange, he continued: "But let it be supposed, for the sake of argument, that there may be some analogy between deeds and bills of exchange, I ask what are the instances in which construction and interpretation have taken so great a liberty with deeds as to afford an argument by analogy for construing in this case a bill drawn payable to order to be a bill drawn payable to bearer? The instances which had occurred to me as likely to be insisted upon do in my apprehension afford no argument in favor of this position. A deed of feoffment, upon consideration without livery, may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed which, under circumstances, may operate as a covenant to stand seised to uses. Why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favor of the intended feoffee. The seisin which

remains in the feoffor, because the deed is insufficient to pass it, must remain in him, bound by the use. This is the effect of the feoffor's own agreement, plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which *his words will bear*. So a deed importing a grant of an interest by two, one entitled in possession, the other in reversion, is, in consideration of law, the grant of the first and the confirmation of the second. Why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both, that the grantee shall have the estate so granted; but the deed of the latter, having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance, called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party, the law says, that they are words of confirmation, and shall enure as words of confirmation, in order to give effect to his deed, *ut res magis valeat quam pereat*. Here, again, the construction which the law puts upon the words of the deed is a construction *which the words will bear*. The words have several technical senses,



Within these limits, an inquiry as to the intent of the parties is certainly of great importance. In practice, the principal difficulty arises, where there is reason enough for believing that one of the parties intended a certain thing, but it is by no means equally clear that the other party intended the same thing. Which intent is to govern in this case?

This question has been much discussed in works of casuistry, of metaphysical or ethical inquiry. But we very much doubt whether an answer which may be good enough in a moral point of view expresses a principle from which a legal rule of construction would be derived. For example, Paley, whose remarks on this subject are often quoted in legal as well as other works, after stating that that meaning is not always obligatory which the promiser actually held, because the promisee might not know that the promiser so meant; nor is it always the meaning which the prom-

of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense, it is true; but if they are interpreted in a manner which the *jus et forma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed, I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances, I venture to lay it down as general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, *that the words may bear the sense which by construction is put upon them*. If we step beyond this line, we no longer construe men's deeds, but make deeds for them." See also *Stratton v. Pettit*, 16 C. B. 435; *Poole v. Bentley*, 12 East, 168; 1 Arn. Ins. 65, 78, and note 2; *The Loughor Coal &*

*Railway Co. v. Williams* (1854), 30 E. L. & Eq. 496; *Higginson v. Dall*, 13 Mass. 101; *New York Ins. Co. v. Thomas*, 3 Johns. Cas. 1; *Mumford v. Hallett*, 1 Johns. 433; *Cheviot v. Barker*, 2 Johns. 346; *Vandervoort v. Smith*, 2 Caines, 155; *Ewer v. Washington Ins. Co.*, 16 Pick. 502; *Whitney v. Haven*, 13 Mass. 172; *New York Gaslight Co. v. Mechanics' Fire Ins. Co.*, 2 Hall, 108; *Halhead v. Young*, 6 Ellis & B. 312; *Weston v. Emea*, 1 Taunt. 115; *Norris v. Ins. Co. of North America*, 3 Yeates, 84, may be thought to qualify if not oppose this rule. For direct application of it to a policy of insurance, see *Mumford v. Hallett*, 1 Johns. 439, where *Livingston, J.*, says: "We must only look to what *has been done*, and not to what was intended. If the parties will not make use of a proper policy, nor make the necessary corrections in the printed forms which they do use, it is their own fault." See also opinion in *Rickman v. Carstairs*, 5 B. & Ad. 662, per *Denman, C. J.*

iser actually gave to the promise, because the promiser might not have intended the meaning, nor justified the promisee in so understanding it, then goes on, "It must therefore be the sense in which the promiser believed that the promisee accepted his promise."<sup>1</sup> But this cannot be a safe and sufficient rule for legal construction.

Suppose, for example, that a person applied for insurance. He intended that his vessel should visit a port in one of the windward West India Islands, but was entirely ignorant of the difference between the windward and leeward islands, or what is really meant by those phrases; and in his own mind reversed this meaning. The insurer knew this; but as the navigation of the windward islands at that season was more dangerous than of the leeward islands, he very willingly prohibited a visit to the windward islands, but permitted the vessel to go to the leeward islands. The insured, by reason of his mistake, makes no objection, and supposes that he has leave to go to what are in fact the windward islands, although he supposes them to be the leeward islands. The vessel visited the windward islands and was lost there. Suppose the fraud was made apparent to the court in an action on the policy; could they give the insured a remedy against the fraud, by constituting the phrase "windward islands" to mean the leeward islands, and the reverse? It may be that courts have in some cases gone almost as far as this;<sup>2</sup> but we apprehend that it would

<sup>1</sup> Paley's Mor. and Polit. Philos. 104.

<sup>2</sup> Thus, in *Potter v. Ontario and Livingston Mut. Ins. Co.*, 5 Hill, 147, one of the conditions of the policy was, that in case the assured should make any other insurance on the same property, and should not, with all reasonable diligence, give notice thereof to the company, and have the same indorsed on the policy or otherwise, *and approved by them in writing*, the policy should cease and be of no further effect. Within a few months afterwards the insured effected a further insurance in another company on the property, at the same time forwarding a written notice of the fact to the secretary of the Ontario & Living-

ston Mut. Ins. Co., and on the next day the insured received a letter from the secretary in these words: "I have received your notice of additional insurance." Held, in an action on the policy that the letter imported both an *acknowledgment* and an *approval in writing* within the meaning of the condition as to further insurance, and that the plaintiff was entitled to recover. Though the chief ground of the decision was, that when the notice was received, the company had an election to continue or terminate the risk, and, until they made their election, the policy remained in force, yet the court based their reasoning upon Paley's rule, quoted in the



be generally admitted that Paley's rule can become a rule of law only, when we add to what he says, "and the promiser used words which can be rationally construed as expressing the sense which the promisee attached to them."

There might be, in such case, another remedy for the insured, either at law or in equity; but it must be remembered, that the question we are considering is only as to the construction of language used; and, however disposed courts have been to construe every contract in such a way as to carry into effect the intention of the party, we are not without decisions in which the courts, while acknowledging the intention of the parties, construe the policies in opposition to this intent, because they are bound by the words used.<sup>1</sup>

text, and say: "Let us apply Dr. Paley's rule in relation to the performance of contracts. He says: 'Where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time the promisee received it.' Now how did the defendants apprehend at the time that the plaintiff would receive their answer? If they secretly reserved the right of approval or disapproval at a future period, could they have believed that their written answer would be so received by the plaintiff? I think not. . . . The plaintiff would reasonably infer from such an answer that the defendants had elected to continue the risk; and they had no right to leave him under that impression until after a loss had happened, and then say to him that their election had not been made. Honesty and fair dealing forbid it."

Perfectly in accordance with the rule as stated in the text is the language of most eminent authority: "If he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him: he cannot be allowed to introduce subsequent restrictions which he has not expressed. It is

a maxim of the Roman law, '*Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere.*' . . . . On every occasion when a person could and ought to have made known his intentions, we assume for true against him what he has sufficiently declared. . . . If the intention which is sufficiently declared were not to be taken of course as the true intention of him who speaks and enters into engagements, it would be perfectly useless to form contracts or treaties." Vattel. Lib. 2, c. 17.

<sup>1</sup> *Rickman v. Carstairs*, 5 B. & Ad. 651, in which the opinion of the court is delivered by *Denman*, C. J. The policy was a valued one, on ship and goods, at and from the coast of Africa, to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and where-soever, to trade backwards and forwards in any order, and to call at or proceed to the Azores, Madeira, &c., and all African islands, beginning the adventure on the goods from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any

SECTION IV. — *Technical or Peculiar Words.*

It sometimes happens that the words used have a peculiar commercial meaning, and then the reason of their use, or of any provision respecting them, may assist in ascertaining that meaning.<sup>1</sup> Or they may be the technical words of a trade or business ;

ships or factories wheresoever she might call. Held, that the policy does not protect an outward cargo shipped before the vessel's arrival on the coast of Africa. After stating the facts, his Lordship said : " In this case it is with regret that we find ourselves obliged to come to the conclusion that the plaintiffs are not entitled to recover for a total loss, because it appears very likely that the assured *intended* by this policy to insure both the outward and homeward cargo, and to have valued both, inasmuch as a great part of the outward cargo would, in such a voyage, remain on board, and would be continually varying in the course of barter ; and nothing is more probable, than that the entire cargo should be valued, to prevent difficulty of valuation in the case of loss. Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used." Then, referring to the cases of *Robertson v. French*, 4 East, 130 ; *Sputta v. Woodman*, 2 Taunt. 416 ; *Horneyor v. Lushington*, 15 East, 46 ; *Langhorn v. Hardy*, 4 Taunt. 630, and others, as establishing that where the policy is upon goods " from the loading thereof," either at a particular place, or in blank upon a voyage from one place to another, it does not attach upon goods previously on board, and stating that this had been

relaxed where there was anything upon the face of the instrument to satisfy the court that the policy was intended to cover goods previously on board, his Lordship thus sums up : " The question then is, whether there is anything *disclosed upon the face* of this policy by which the court can be convinced that it was intended to attach upon the outward cargo." See also *Bell v. Hobson*, 16 East, 240 ; S. C., 3 Campb. 273 ; 1 Arn. Ins. 420, § 158.

<sup>1</sup> In *Howe v. Mut. Safety Ins. Co.*, 1 Sandf. 137, 2 Comst. 235, *Sandford, J.*, said : " There is a great variety of cases in which the courts have permitted evidence to be given, to show the meaning of the terms in commerce and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as a proof of *usage*, although in many cases it is rather the definition of technical language." In illustration of the principle upon which cases proceed, the court instanced the case of " roots " being proved not to include sarsaparilla ; in the clause relative to average in a marine policy, the insurance being on sarsaparilla. *Coit v. Commercial Ins. Co.*, 7 Johns. 385. So, where the term " skins," in a like instance, did not include bear-skins having the fur on them. *Astor v. Union Ins. Co.*, 7 Cow, 202. The word " outfits " in policies on whaling vessels includes one fourth of the catchings, the catching becoming virtually the proceeds of a large portion of the outfits, and the

for there may be in this instrument, as in any other, words peculiar to a certain art or occupation. Such words occur most frequently in instruments respecting machinery and the like, but they may occur in any instrument, and wherever they occur, witnesses who are experts may be called to give their meaning. The word "experts," from the Latin word *experti*, signifies persons who have been taught by experience in this peculiar art or business. They are very frequently called in insurance cases, but generally in rela-

like. *Macy v. Whaling Ins. Co.*, 9 Met. 354. So, where proof had been allowed of the meaning of the term "sea-letter" in policies at a particular port; the meaning of the word "cargo," in particular voyages and lines of trade; the customs of a particular trade in respect of convoy; the mode of unloading goods at the port of destination; the period of detention allowable at intermediate ports for landing parts of a cargo; the meaning of "proceeds of goods shipped," and the like.

So in England it has been held that "corn" is a general term, including many particulars, as peas and beans, *Mason v. Skurray*, Park, 245, 253 (8th ed.) and malt, *Moody v. Surridge*, Id. 245; though it did not include rice, *Scott v. Bourdillon*, 2 Bos. & Pul. N. R. 213; and the term salt has been held not to include saltpetre. Per *Wilson, J.*, Park, 245. See also *Parr v. Anderson*, 6 East, 202. In this case the question whether an insurance of a ship *with or without letter of marque*, upon a certain voyage and commercial adventure from A to B, enables her to chase, for the purpose of attack and capture, any vessel she may happen to descry in the course of the voyage insured, in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not; or whether those words are to be confined to a leave to employ force only for

the purpose of *defence* (including a liberty of attack and chase only so far as they may be fairly supposed to promote ultimate security), the answer was held to depend, in the absence of any legal decision as to their construction, upon the received practice and known sense of commercial men, if any such received practice there be in the use of them. And, to ascertain the commercial usage and practice in that respect, the cause was referred to another trial. See *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, Id. 405, in notes; *De Longuemere v. Firemen's Ins. Co.*, 10 Johns. 126; *De Longuemere v. N. Y. Fire Ins. Co.*, Id. 120, defining the word "port" with reference to the subject-matter to which it is applied. *Taylor v. Briggs*, 2 Car. & P. 525; *Deght v. Hartshorne and others*, 2 Johns. 531. See also the opinions of Mr. Baron *Parke*, and Lord Chief Justice *Tindal*, in the case of *Attorney-General v. Shore*, 11 Simon, 592, where an able *résumé* of the entire subject of admissibility of parol evidence on this ground will be found. See also 1 Greenl. Ev. §§ 329, 330, and authorities there cited. 1 Phillips, Ins. p. 93, *et seq.* *Eaton v. Smith*, 20 Pick. 156. In a policy upon a ship and its furniture, the term "furniture" was held, by virtue of usage, to include the provisions. *Brough v. Whitmore*, 4 T. R. 206.

tion to the condition or character of a vessel, or other facts in the case. They may, however, be called in reference to the construction of a policy, if technical words, as we have already defined them, appear in it.<sup>1</sup>

This has been applied to questions arising in commercial cases.<sup>2</sup>

<sup>1</sup> 2 Pars. Contr. (5th ed.) 555, 556, and *notes a* and *b*. The testimony of experts is so far matter for the jury, that if it be contradictory and conflicting or uncertain, it is to be weighed by them. But the legal effect of the words and phrases, when their meaning is ascertained by experts, belongs to the construction of the contract, and is for the court. *Story, J.*, in *Rogers v. Mechanics' Ins. Co.*, 1 Story, 608. In *Armstrong v. Burrows*, 6 Watts, 266, where the only matter in dispute was as to the date of a receipt given by the plaintiff, the date being illegible, the court upon the trial assumed an exclusive right to decipher the instrument, and to determine the date upon the evidence given. Upon error, *Gibson, C. J.*, in reversing the judgment of the court below, said: "That the court assumed an exclusive right to decipher the contested letters is both true and fatal. It doubtless belongs to it to interpret the meaning of written words; but this extends not to the letters, for to interpret and to decipher are different things. A writing is read before it is expounded, and the ascertainment of the words is finished before the business of exposition begins. If the reading of the judge were not matter of fact, witnesses would not be heard in contradiction of it; and though he is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters would be the same

that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were therefore not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent."

<sup>2</sup> Thus ship-builders may give their opinions as to the sea-worthiness of a ship, from examining a survey or description of the vessel made by others, when they were not present. This is evidently a matter of mechanical skill. *Thornton v. Royal Exch. Ass. Co.*, Peake's N. P. C. 25; *Beckwith v. Sydebotham*, 1 Campb. 117. So, commercial men may be called to prove the meaning of any particular expression used in a letter on a commercial subject. *Chaurand v. Angerstein*, Peake's N. P. C. 48, in which Lord *Kenyon* says: "In questions on the arts and sciences, the evidence of persons versed in those arts is daily admitted. Foreign laws are also matters of evidence, and yet all these are only the opinions of the witnesses." So an engineer or engraver may give his opinion on matters belonging to his particular science or art. *Goodtitle v. Braham*, 4 P. R. 498. The cases of *Durnell v. Bederly*, 1 Holt, N. P. C. 283, and *Berthon v. Loughman*, 2 Stark, N. P. R. 288, are in direct conflict with each other. In the first, *C. J. Gibbs* virtually ruled that the opinion of underwriters, whether, upon certain facts being communicated to them, they would or would not have insured the particular voyage, could not be received in evidence; that the

It is seldom, however, that this resort to experts for the explanation of strictly technical words is necessary in actions on policies of insurance. The words there used are mercantile words, and must be understood in the sense in which they are commonly employed by merchants.<sup>1</sup> Hence, in determining this meaning, usage has very great force.

materiality of such intelligence or rumors was a question for the jury, under the circumstances of the case, and ought not to rest upon the opinions of mercantile men. In the other case, *Holroyd, J.*, permitted a witness conversant with insurance business to give his opinion, as a matter of judgment, whether the communication of particular facts would have enhanced the premium. But such testimony was subsequently held, by *Denman, C. J.*, and his associates, to be inadmissible. *Campbell v. Rickards*, 5 B. & Ad. 840. The former decision is also adopted in *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 79. *Sutherland, J.*, quoting from Chief Justice *Gibbs, supra*, says: "It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science in which scientific men will mostly think alike, but a question of opinion liable to be governed by fancy, and in which the diversity might be endless." The case of examination of experts respecting the seaworthiness of a ship was put by Lord *Ellenborough* upon the same ground as calling a physician or surgeon in cases belonging to science and experience in their professions. *Chapman v. Walton*, 10 Bing. 57; *Richards v. Murdock et al.*, 10 B. & C. 527, overruled by *Campbell v. Rickards*, 5 B. & Ad. 840.

When the meaning of a word used to designate an article of trade is to be fixed by proof of mercantile usage, it may be by the usage of trade among

merchants dealing particularly in that article. *Astor v. Union Ins. Co.*, 7 Cow. 202. In the case of *Coit v. Columbian Ins. Co.*, the words of the memorandum were "vegetables and roots, and all other articles *perishable in their own nature*." This phrase was introduced to apply more specifically to *onions, beets, &c.*, being roots perishable in their own nature. Sarsaparilla being a dry, hard root, not liable to decay, evidence was therefore admitted to show that mercantile usage excluded these from the term "roots." The language of the clause therefore defined itself, and gave the clew to its construction. *Carter v. Boehm*, 3 Burr. 1905, 1913, 1916. See *Crofts v. Marshall*, 7. P. & C. 597; *Hall v. Ocean Ins. Co.*, 21 Pick. 472.

<sup>1</sup> 1 Arn. Ins. 77, 342, 434; *Pelly v. R. Ex. Ass. Co.*, 1 Burr. 349, 1 Duer Ins. 180. In *Schooner Reeside*, 2 Sumn., Mr. Justice *Story* says: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kind of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law."

In the construction of all contracts it is indeed a rule which is founded on obvious justice and reason, that if words are used which are peculiar to the subject-matter of that contract, and when so used have a meaning which is well, widely, and long known, the parties must be presumed to have used those words with that meaning. This is but an application to peculiar and technical words of the universal rule by which we determine the meaning of all words ; for our dictionaries give us nothing but the meanings which words have acquired by universal usage, as is expressed by the Latin adage, *Usus est norma loquendi*.<sup>1</sup>

<sup>1</sup> Lord *Ellenborough*, in *Robertson v. French*, 4 East, 135, said : " We are not to adopt that meaning to which the etymology of the words, or their employment by classic writers, or the definitions of lexicographers, might alone direct us ; nor that construction of a clause or sentence which a strict attention to its grammatical structure would seem to require ; but common and general use is to guide us to their true acceptation." This is but an adoption of the principle asserted by Grotius (*De Jur. B. & P.*, Lib. II. c. 16). The words are to be understood according to their proper meaning, not the grammatical one, which regards the etymon and original of them, but what is vulgar and most in use ; for *use is the judge, the law, and rule of speech*. So in *Coit v. Com. Ins. Co.*, 7 Johns. 390, it is said : " If any terms in a policy have, by the known usage of trade, or by use and practice, as between assurers and assured, acquired an appropriate sense, they shall be construed according to that sense and meaning."

The remarks of Mr. Justice *Story*, in *Palmer v. Warren Ins. Co.*, 1 Story C. C. 360, may also be cited in illustration : " Policies of insurance are generally drawn up in loose and inartificial language, and indeed in the language of common life, and therefore are al-

ways construed liberally, and rarely, if it is possible, subjected to any nice or narrow or critical strictness, or any technical interpretation. We look rather to the intent than to grammatical accuracy in the use of language." *Clark v. United M. & F. Ins. Co.*, 7 Mass. 369, per *Sewall, J.* : " A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed, indeed, in the construction of contracts generally, where the conclusion is not avoided by special circumstances or stipulations." *Smith v. Wilson*, 3 B. & Ad. 728, is a case strongly illustrative of the force of usage. See this case stated *infra*, p. 83, n. 2. *Parke, J.*, in delivering the opinion, adopts the language of Mr. *Starkie*. He says : " The rule deducible from the authorities on this subject is correctly laid down in 3 *Starkie on Evidence*, 1033. Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter ; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not, on that account, void ;



SECTION V.—*Usage.*

THERE are no contracts in the construction of which usage is so often and so usefully invoked as contracts of insurance.<sup>1</sup> For the whole business of insurance, and all the instruments by which it is carried on, and all their language and provisions, rest on the usage of merchants; and nearly all the law of insurance is but the usage of merchants, adopted and sanctioned by courts.

It is obvious, however, that it is possible to carry this function of usage quite too far; and rules have been adopted or principles as-

it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters. Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them." And per Lord *Kenyon*, C. J., in *Brough v. Whitmore*, 4 T. R. 208: "When a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them."

<sup>1</sup> In *Clark v. United M. & F. Ins. Co.*, 7 Mass. 369, *Sewall*, J., says on this point: "Questions are continually arising on the operation and practical construction of policies of insurance, — a species of contract liable to a variety of incidents, and to be enforced in a great number of cases distinguishable from each other in the principles applicable to the decision. For rules to

govern in these inquiries there is more than ordinary reference to established usages; and these, when ascertained, and found to be suitable applications of general principles, or not inconsistent with them or with the tenor of the contract to be explained and enforced, are considered as authoritative upon the parties." In a very early case on this subject it was held that the clause "warranted to depart with convoy" must be construed according to the usage among merchants, i. e. from such place where convoys are to be had. *Lethulier's case*, 2 Salkeld, 443. In *Brough v. Whitmore*, 4 T. R. 206, where the insurance was on "the tackle, ordnance, ammunition, artillery, and furniture of the ship, it was held, that provisions sent out in the ship for the use of the crew were protected under this clause. And *Buller*, J., said: "Without commenting on the words of the policy, it is sufficient to say, that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage." See also *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108, per *Putnam*, J.

serted which are intended to confine this resort to usage within proper limits.

One of these rules is, that evidence of usage comes in only where the language of the policy requires this evidence for its proper interpretation.<sup>1</sup> It must not be understood by this, that where the words are unambiguous, and have, as commonly used, a plain and certain meaning, usage is never permitted to control or vary this meaning. For example, Mr. Phillips says that "the resort to usage for a construction presupposed a question to be determined; for if the language of a policy be plain beyond all question, there is no need of any proof of the usage. Nor if the law be well settled." And this statement is only an adoption of the rule laid down by Marshall.

It is certain, however, that the natural and ordinary meaning of the words, as that may be determined by common use, may be controlled by evidence of usage.<sup>2</sup> And yet what phrase has a

<sup>1</sup> The true meaning and extent of the application of this rule are well and clearly expressed in the decision in the case of *Boldero v. East India Company*, 26 Beav. 316: "When the terms of a contract are plain, usage can have little effect on the construction to be placed upon it; but when it is ambiguous, the usage for a long time may influence the judgment of the court, by showing how it was understood by the original parties to it."

<sup>2</sup> Thus Mr. Arnould says (1 Arn. Ins. 78, Rule IV.): "A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal; such evidence will never be admitted to set aside or control its plain and unambiguous terms." In support of this proposition, Mr. Arnould cites the language of *Hubbard, J.*, in *Macy v. Whaling Ins. Co.*, 9 Met. 363: "As to written contracts, it has been held that usage is admissible to explain what is doubtful, but not to contradict that which is plain and free from ambiguity. Otherwise the parties will

be arbitrarily held to mean differently from that which they have written." Judge *Hubbard* certainly says this; but he adds: "But while this is true, still, evidence is admissible to show that the contract, notwithstanding the common meaning of the language used, was in fact made in reference to the usage in the trade to which the contract relates." In that case, evidence was held admissible to prove a usage, among owners of whale-ships and underwriters, to treat a policy of insurance on outfits as covering one quarter part of the catchings. The court rely on the case of *Smith v. Wilson*, 3 B. & Ad. 728, in which evidence was admitted to prove that the word "thousand," by the custom of the country where the lease (of a rabbit-warren) was made, as applied to rabbits, denoted twelve hundred. From this case it is clear that Mr. Arnould's rule is too broad; for what can be more plain and unambiguous than words denoting number? Mr. Justice *Taunton*, in the case last cited (3 B. & Ad. 728), says: "Words denoting weight, or



more definite meaning than "the Indian Islands." All our maps and geographies tell us what these islands are. Mauritius certainly is not one of them, and it certainly is an African island. And yet, where a vessel was insured to a port or ports of lading in India or the Indian Islands, and the vessel sailed for Mauritius and was lost, usage was permitted to prove that merchants and insurers usually ranked this island among the Indian Islands.<sup>1</sup> So the Baltic Ocean is one thing, the Gulf of Finland another; and yet a court received evidence that the Gulf of Finland is usually comprehended as a part of the Baltic Ocean in mercantile language, and founded their judgment on this usage.<sup>2</sup> And in one case it was held that the word "cargo," because it was a mercantile term, was not to be defined by a dictionary, in a case upon a policy of insurance, but by mercantile usage.<sup>3</sup>

measure, or number, must undoubtedly be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute or given by custom."

The rule, therefore, would seem to be, that, where words are either obviously obscure or ambiguous, or are shown to be ambiguous, evidence of usage is admissible to show their meaning. This will be seen to be in entire accordance with the statement in the text, and supported by the authorities. Thus, in the opinion of *Hubbard, J.*, cited above, it is further said: "'Outfits' is a word, then, of originally limited meaning, as applied to different trades and in its application to vessels; but it has acquired an enlarged meaning in the hands of merchants engaged in whaling voyages, adapted to their growing trade; and, as thus used, 'outfits' is a word not so clearly defined and strictly limited in its import, nor is it of that plain and decisive character that we are required necessarily to hold that it is used in policies without reference to an existing custom in this important branch of trade, or that the parties using it in-

tended to confine its application to the outfits as they existed when the ship left her port of departure." To words, then, of that "plain and decisive character" alone the rule as to exclusion of parol evidence would apply in its full strictness. In *Preston v. Greenwood*, 4 Doug. 28, Lord *Mansfield* says: "Usage is always considered in policies of insurance, even when no difficulty arises on the words themselves." We can hardly adopt Mr. Duer's deduction, that "his evident meaning was, even when the words and the construction are plain and unambiguous." It seems quite plain that his meaning was, that usage should be admitted even where words are *apparently* plain and unambiguous. See also, in illustration of the text, *Sleght v. Hartshorne*, 2 Johns. 531; *Dow v. Whetten*, 8 Wend. 160.

<sup>1</sup> *Robertson v. Money*, 1 Ry. & Moody, 75.

<sup>2</sup> *Uhde v. Walters*, 3 Campb. 16.

<sup>3</sup> *Houghton v. Gilbert*, 7 Car. & P. 701. This was an action of assumpsit on a policy of insurance. The counsel for the defendant claimed that the word "cargo" was very intelligible, and must

These may be thought extreme cases ; but, however difficult it may be to draw an exact line, the general rule must be, that if the parties use words which have a plain and certain meaning, as used by them, neither of them can be permitted to control or vary these words by evidence.<sup>1</sup>

mean the whole loading. He was referring to Entick's Dictionary, when he was interrupted by *Tindal*, C. J., who said: "It is a question of mercantile construction. You had better lay aside your dictionary and appeal to the knowledge of the jury ; for, after all, the dictionary is not authority."

<sup>1</sup> 1 Duer, Ins. 176 *et seq.*, where this point is discussed at length. In the course of that discussion it is said: "The true meaning of the rule excluding parol evidence is, that such evidence shall never be received to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words they have used, upon any construction, will admit or convey." Then again: "The admission of the evidence violates the *letter*, but not the *spirit*, of the rule by which parol evidence is forbidden." 1 Duer, Ins. 177. But it is apprehended that it violates neither. Prof. Greenleaf (1 Greenl. Ev. 327 *et seq.*), upon whose work Duer so strongly relies in his elaborate discussion, lays down the rule thus: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." His subsequent remarks indicate the precise limits within which this rule is to be applied. "It is to be observed," says he, "that the rule is directed only against the admission of any other evidence of the *language* employed by the parties in making the contract than that which is furnished by the writing itself. The writing, it is true, may be read by

the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties ; but, as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it nor substituted in its stead." The *letter* of the rule does not extend beyond this. In *N. Y. Gas-Light Co. v. Mech. Fire Ins. Co. of N. Y.*, 2 Hall, 108, parol evidence was held inadmissible to prove a verbal representation made by an agent at the time the policies were effected, as to the value of certain fixtures intended to be placed by the plaintiffs. The court in their opinion say: "As to the parol proof offered by the defendants, it was clearly inadmissible. The contract is to be construed by its own terms plainly expressed in the policies, and it cannot be varied by the proof rejected at the trial." In *Lewis v. Thatcher*, 15 Mass. 431, the action was upon a policy on property on board "the *Swedish brig Sophia*," and it was holden that these words amounted to an absolute warranty that the vessel was *Swedish*, and that no parol evidence was admissible to show that anything less was thereby intended by the parties to the insurance. *Parker*, C. J., delivered the opinion of the court: "We are all of opinion that the warranty is absolute and unqualified, and that parol evidence ought not to have been admitted to prove that something less than such warranty was intended by the parties to the contract. It would be unfit to admit such evidence, and it

Few questions are of greater importance, or of more frequent recurrence in actions on policies than those connected with offered

is certainly against law so to do. For where there is a written contract, that must be abided by; and the parties should conform their contract to their actual intentions. . . . To say in writing that they will warrant one thing, and then prove that they meant to warrant something else, would be opening a door to frauds and perjuries which the rules of law have aimed to close. If what the plaintiff contends for was the true intent and meaning of the underwriters, it may be dishonorable in them to insist upon the strict letter of the contract; but if they claim their bond, the law will give it them. And it is for the public good that parties should know, that when they undertake to stipulate in writing, in contracts of this nature, they must make the contract speak their real intentions, and not solemnly declare one thing in writing, and then avoid the effect of it by verbal declarations." And accordingly the plaintiffs were non-suited.

In *Rankin v. American Ins. Co.*, 1 Hall, 619, the claim was for damage sustained by perils of the seas. On the arrival of the goods at New York they were landed, before the wardens of the port had held a survey upon them; and the counsel for defendants offered to prove that, by the usage of trade in the port of New York, the master of the vessel is responsible for damages sustained by goods delivered by him to the owner or consignee, unless there has been an actual survey, on board the vessel, by the port wardens, by which it shall have been found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that by a similar usage, as between assurers and

assured, the report of survey so made is a document indispensable to be produced, in order to charge the underwriters, and that the preliminary proof is deemed insufficient, unless such a document is exhibited as a part of it. But evidence to prove such usage was not admitted, either as an objection to the preliminary proofs, or in bar of the action. *Oakley, J.*, in delivering the opinion, said: "The rule as to the admission of usage, to control the construction of a policy, seems to be, that it may be resorted to to fix the sense of particular terms in the instrument, where they have acquired a peculiar meaning, as between the assurers and assured. . . . But it is well settled that a usage can never be set up to affect or vary an express agreement, nor to contradict a rule of law. . . . By the terms of the policy in the present case, the defendants bound themselves to pay all damage to the property insured arising from the perils of the sea; and the attempt now made is to introduce into the contract a condition that they shall not be responsible, unless such damage is ascertained in a particular mode, and that, too, by the act of third persons, over whom the assured have no control. Such a condition would, in my judgment, vary the legal obligations of the defendants, as ascertained by the plain language of the policy." See also *Mellen v. Nat. Ins. Co.*, 1 Hall, 452.

Where the underwriter, in a policy of insurance, professes to take "the risks contained in all regular policies," a loss by capture was held to be within the policy, and parol evidence was not admitted to prove that the parties understood it as covering sea risks

evidence of usage. While we endeavor to state in the text the principles and rules we deduce from the authorities, we give in

only. *Levy v. Merrill*, 4 Greenl. 180. In *Turner v. Burrows*, 8 Wend. 144, evidence that a policy executed *in blank* is deemed by insurance companies and the commercial community equivalent to a policy *for account of whom it may concern*, was held inadmissible. *Finney v. Bedf. Com. Ins. Co.*, 8 Met. 348. In *Parkinson v. Collier*, Park. (8th ed.) 653, Lord *Kenyon* refused to admit evidence of usage, by which it was attempted to show that an insurance on goods, *till discharged and safely landed*, would expire after the ship had been moored at anchor twenty-four hours, because inconsistent with the plain and unequivocal language of the policy. In *Blackett v. Royal Exch. Ins. Co.*, 2 Cr. & J. 244, one of the questions was whether parol evidence of a usage was admissible to show, that for boats on the outside of the ship, slung upon the quarter, underwriters never paid, and Lord *Lyndhurst* rejected the evidence, saying that his objection was, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. *Hall v. Janson*, 4 Ellis & B. 500, 29 Eng. L. & Eq. 111. Declaration setting out a policy of insurance in the ordinary form on a ship and cargo from Cardiff to Panama, with a memorandum stating that the assurance thereby effected was and should be on money advanced on account of freight, &c. During the voyage the ship was greatly damaged by storms, and was obliged to put in at Valparaiso to repair, incurring a heavy expense.

This action was brought to recover contribution from the defendants. Plea, that the policy was made in London, and, according to usage and custom of merchants and underwriters effecting and underwriting marine insurances in London, an insurer of money advanced on account of freight was not liable to a general-average loss and contribution. Held bad; and that, by the express words of the policy, "freight is warranted free from average under £5 per cent unless general, or the ship should be stranded," the underwriter on freight expressly and universally undertook to pay general average, however large or small the amount might be. Lord *Campbell*, C. J., said: "Can the alleged usage be set up as a bar to the action? We think that it cannot; for it is entirely in derogation and contradiction of the written contract. Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade, and a usage consistent with a written contract may be introduced into it, as both parties, being aware of it, may be supposed to intend that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been made." *Weston v. Ends*, 1 Taunt. 115; *Hughes, Ins.* 146; Lord *Kenyon*, in *Aguilar v. Rodges*, 7 T. R. 423. And in *Bargett v. Orient Mut. Ins. Co.*, 8 Bosw. 385, the court refused to admit evidence of a usage that the term "free from average" meant "free from average unless general."

our notes a collection of the leading cases on various branches into which this subject of usage divides itself. They may, at least, assist the reader to apply these rules more specifically to any actual case which seems to be in analogy with them.

It is often said by the courts, and as emphatically in cases of insurance as any other, that, where parties enter into an express contract, they can make that contract what they will, and express it as they choose; being of course bound by the law of the case, but under no obligation whatever to pay any regard to mere usage. And as they may supersede usage at pleasure, usage cannot come in to contradict the words they use.<sup>1</sup>

<sup>1</sup> See authorities, *supra*. In the case of *The Schooner Reeside*, 2 Sumner, 569, Mr. Justice Story said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. *An express contract is always admissible to supersede, or vary, or control a usage or custom, for the latter may always be waived at the will of the parties.* But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and im-

plications, properly arising in the absence of any positive expressions of intention to control, vary, or contradict the most formal and deliberate written declarations of the parties." 2 Pars. Cont. (5th ed.) 546, n. (x).

The alleged custom, in Philadelphia, to strike off *one third* of the gross freight for charges, and to pay *two thirds* only to the assured, in a policy on freight, where a total loss has occurred, was held to be unreasonable, and in direct opposition to the terms of the policy. *McGregor v. Ins. Co. of Pennsylvania*, 1 Wash. C. C. 39. *Sed quære*, if such an alleged custom were generally known by those interested in its operation, what would have been its operation? See *post*, p. 96, n. 1, where this case is again referred to. In *Mercantile Mut. Ins. Co. v. State Mut. F. & M. Ins. Co. of Penn.*, 25 Barb. 319, the question arose as to the construction of the following order for re-insurance: "Re-insurance is wanted by the Mercantile Ins. Co. for \$ — on cargo on board of the ship *Great Republic*, at and from New York to Liverpool, on the excess of risks the applicants may have over \$ 50,000, not to exceed \$ 15,000 dollars." At the time of the loss the plaintiffs had insured less than \$ 50,000 on the cargo of the ship, but they had risks on the freight and on

Another rule limiting the resort to usage is, that it must be shown to have been within the recognition and contemplation of the parties.<sup>1</sup> The usage offered may be sufficiently ancient and

the ship, which, when added to the amount on the cargo, amounted to over \$ 65,000. It was held that the defendants only engaged to insure the excess of risks on the cargo; and that evidence of a custom of the parties and of the port of New York, in adjusting contracts of re-insurance upon such applications, to regard the word 'excess' in the application as applicable to the whole amount of insurance at risk in or upon the vessel, and that the premiums upon open policies had previously been adjusted and paid between the present parties upon that principle, was properly excluded, there being no ambiguity on the face of the instrument. See also *Bentaloe v. Pratt, Wallace*, 58, 64. In *Illinois Mut. Fire Ins. Co. v. O'Neile*, 13 Ill. 89, it was held that if the charter of an insurance company declared the contract to be void in case of additional insurance on a house, unless it was made with the consent of the company, evidence of usage that this applied to goods was not admissible. *Abbott on Shipping* (6th Am. ed.) 356.

<sup>1</sup> *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603. The usage or custom of a particular port in a particular trade, is not such a usage or custom as will, in contemplation of law, limit, control, or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, both applicable and applied to all the ports of the State, and so notorious as to afford a presumption that all contracts of insurance in that trade are made with reference to it, as a part of the policy. The usage attempted to be shown was, that blubber was not an insurable interest in policies on whaling

voyages, or entitled or liable to contribution. And *Story, J.*, in delivering the opinion, says: "The usage must be, from its character and extent, so notorious, that all such contracts of insurance in that trade *must be presumed to be entered into by the parties with reference to it*. . . . It would be most dangerous to admit parol evidence to control the solemn contracts of parties who are not, or cannot be, presumed to know it, or to adopt it, as a rule to govern their own rights or interests." *Mason v. Franklin Fire Ins. Co.*, 12 Gill and Johns. 468. In *Macy v. Whaling Ins. Co.*, 9 Metc. 354, the vessel was owned in Nantucket, and was insured in Boston and New Bedford. The question arose respecting a certain usage which was well established in New Bedford, and the court said: "The inquiry will be, whether the usage is general to all who are concerned in the trade, or whether it is a local usage, and confined to the ports of the Commonwealth; and if local, whether the merchants and underwriters in Nantucket and Boston are conversant with it, and practise upon it. . . . But if the custom is limited to the port of New Bedford, or is not well known or established in Nantucket and Boston, then it cannot be admitted to affect the construction of the defendants' policy, or to lessen the amount of their contributory share of the loss." *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254. Insurance from Kingston, Jamaica, to Aruba, with liberty to take in the whole or part of her cargo at Coro. The vessel sailed to Aruba, thence to Coro, and then returned to Aruba, and was there captured. A usage was insisted upon to call at Aru-



widely known and commonly practised upon to raise this pre-

ba to take in a supercargo to Coro, and that it was the course of trade to land this person at Aruba again. But the evidence was excluded by *Washington, J.*, who said it should appear that this course is uniformly pursued, and that it should be known as well to the underwriters as to the insured. *Trott v. Wood*, 1 Gall. 442; *Collings et al. v. Hope*, 3 Wash. C. C. 149; *Hughes, Ins.* 146; *Crosby v. Fitch*, 12 Conn. 422; *Leach v. Perkins*, 17 Maine, 462, per *Shepley, J.*, who held: "The rights of parties are to be determined by law, and not by any local custom or usage, unless there be proof that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon." *Bentaloe v. Pratt, Wallace*, 58, where it is said, "that a usage ought to be clearly made out, its existence, its extent, and its notoriety should be indisputable." And in *McGregor v. Ins. Co. of Penn.*, 1 Wash. C. C. 39, the court said: "Customs, acquire the force of law, because, as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved." The case held, that notice of a custom must be given, or the evidence must be such that the jury might presume the party knew it. In *Cobb v. New England Mutual M. Ins. Co.*, 6 Gray, 192, 200, insurance was effected in Boston on a vessel in Maine, at and from Perry, to stop at Eastport, and at and thence to a Southern port. The court said: "The contract is presumed to be made with reference to the usages of the place to which the contract has reference; in this case, that it was usual to take vessels built at Perry to Eastport to be rigged and equipped for sea."

In *Collings v. Hope*, 3 Wash. C. C.

149, three or four merchants were examined to prove the usage; one of whom stated this to be the usage, but the others knew of no such usage. *Washington, J.*, said: "What is called the custom or usage of trade is the law of that trade; and to make it all obligatory, it must be ancient (sufficiently so, at least, to be generally known), certain, uniform, and reasonable. A usage of so doubtful authority as to be known only to a few, and where merchants engaged in the trade differ, as they do in this case, as to the existence of it, can never be regarded." See also *Gordon v. Little*, 8 Serg. & Rawle, 533; *Stevens v. Reeves*, 9 Pick. 198.

A necessary consequence of this principle is, that usage confined to one locality does not affect parties of a different locality, or, as Mr. Arnould expresses it (1 Arnould on Ins., Perkins's ed. 71): "The usage of a particular place, or of a particular class of persons, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it." Thus, in *Natchez Ins. Co. v. Stanton*, 2 Sm. & M. 340, it was held that the usages of insurance offices at New Orleans could not affect insurance offices at Natchez. And in *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26, where a Rhode Island ship was insured in New York, evidence of the usage in New Bedford was held to be inadmissible. And in *Mason v. Franklin Fire Ins. Co.*, 12 Gill & J. 468, where the question arose as to the construction of a policy on a vessel building in Baltimore, it was held that the usage in New York under similar circumstances could not be admitted in evidence. The court say: "What was the usage in other ports of the Union could not be considered as entering into



sumption without any evidence affecting the parties particularly.<sup>1</sup>

the views of the parties in the formation of the contract." See also *Gabay v. Lloyd*, 3 Barn. & Cress. 793; *Eager v. Atlas Ins. Co.*, 14 Pick. 143, per *Wilde, J.*

<sup>1</sup> 1 Arn. 65 (Perkins's ed.); per *Shaw, C. J.*, in *Winsor v. Dillaway*, 4 Met. 223; 1 Phill. Ins. 87, 88. "Every underwriter," says Lord *Mansfield*, "is presumed to be acquainted with the practice of the trade he insures." The description of the voyage in the policy is a reference to "what is usually done by such a ship, with such a cargo, in such a voyage, and this usage is understood to be referred to by every policy, and to make a part of it as much as if it was expressed." And, therefore, where it had been the universal custom, for many years, in the China trade, for all European ships while at Canton to store their rigging and furniture in store-houses built for them on sand-banks in the river, and known as bank-sauls, to be kept dry until the ship should be cleaned, it was held that every underwriter insuring a risk in the Canton trade must be considered to have made it with reference to this usage; that the storing of the rigging in the bank-saul must be deemed to have been as much a part of the course of the voyage insured as though it had been expressed so to be in the policy; and that the underwriters were, therefore, as much liable for a loss by fire happening to the rigging so stored as for any similar loss occurring in any other part of the voyage. *Relly v. Royal Exch. Ass. Co.*, 1 Burr. 341, 350.

So, a knowledge of the usages of a public office, where individual insurers are in the practice of underwriting, is imputed to those who are in the habit of transacting business there. *Gabay v.*

*Lloyd*, 3 Barn. & Cress. 793, where the policy was on fish at and from Newfoundland, to a port in Portugal, and the ship, after discharging her first cargo at Newfoundland, made an intermediate voyage, which the defendants claimed retarded the trip insured, and increased the risk; and the ship was lost on the trip to Oporto with the cargo of fish; the plaintiff was held entitled to recover on proof of a usage, that when several ships belonging to a merchant arrive together at Newfoundland, and find cargoes for some only, he sends the rest on an intermediate voyage. Though the policy *prima facie* means the first cargo which shall be laden after the ship's arrival, yet the underwriter must be held to refer himself to the usage of trade, which he is bound to know. *Ougier v. Jennings*, 1 Campb. 505, in notes. In the Newfoundland trade, where the chief object of the voyage is to take fish, it is a well-known and universal usage that the cargoes insured on such voyages, being principally salt and provisions, are taken out as they are wanted, and not landed on arrival, like other cargoes; on such voyages, therefore, it has been held that the underwriter, who must be taken to have insured with full cognizance of this usage, cannot exempt himself from liability for a loss upon the goods, which has not taken place until long after the time when, but for such custom of the trade, his liability under the mere terms of the policy would have been at an end. *Noble v. Kennoway*, Dougl. 510. Evidence of a usage which had prevailed in one trade was held rightly admitted to prove that the same usage was binding on those engaged in another trade of the same kind, carried on in the same way. *Id.* *Vallance v. Dewar*, 1

This is commonly the case wherever usage is offered. Whether it is so or not might perhaps seem to be a question of law, within Campb. 503. And if the usage be general, it makes no difference, for this purpose, that it is not uniform. *Id.*

So, where by usage a port, though designated and distinct, has acquired an extension over neighboring places, the parties are bound by such usage. As where there was a policy on goods "at and from the ship's loading port or ports in Amelia Island." There is no port of any sort on the island; but it is the custom of the Florida trade for ships to ascend the St. Mary's River to Tigre Island, and there to load, then to drop down to Amelia Island to pay duties and obtain clearances. Held, that the insurer was bound by this usage, and could not object that the policy never attached, because the goods had been loaded, not at Amelia Island, but at Tigre Island, as was the usage. And this, although in some instances ships make fast to Amelia Island by an anchor put on shore, and load there. *Moxon v. Atkins*, 3 Campb. 200.

Where at Archangel it was the custom, immediately on a ship's arrival, to seal down her hatches, send a custom-house officer on board until the goods were unloaded, and take the goods to the government warehouses until the duty was paid, a merchant who had insured his goods from London to Archangel, "until they should there be discharged and safely landed," was held to have no right of action against the insurer for a loss by subsequent confiscation, after they had been so taken in charge by the Russian government; and Lord *Ellenborough* said: "The goods were landed according to the usual course of trade at the port of Archangel. This is all the underwriters undertook for." *Brown v. Carstairs*, 3 Campb. 161.

A policy on goods, to be safely landed at Leghorn, is discharged by landing them at the Lazaretto, that being the place of landing under the usage of the trade, — "a usage of ancient date and general notoriety." *Gracie v. Marine Ins. Co.*, 8 Cranch, 75. It was the well-known practice of the East India Company to reserve in their charter-parties the right to employ the vessel in intermediate voyages from one port to another in India. The vessel was lost, and the insurer was held liable under such usage. Lord *Mansfield* said: "The unanimous opinion of the court was, that the usage of the East India Company's trade, and the course of their voyages, was so notorious and well known to both insurers and insured, that they must be supposed fully apprised and sufficiently conversant of it, and that the obligation of this policy is to be taken from the words of the charter-party, and the usage of these voyages, in the same manner as if it was expressly inserted in the policy. *Salvador v. Hopkins*, 3 Burr. 1707; *Brough v. Whitmore*, 4 T. R. 206; *Kingston v. Knibbs*, 1 Campb. 508, in notes. This was an action on a policy on a ship from Oporto to London. The ship having taken in a part of her cargo within the bar of Oporto, went outside to take in the remainder, when she was driven out to sea by a gale and captured. It was proved that it was usual for vessels to do so at Oporto, under certain circumstances. Lord *Ellenborough* held that the underwriters were bound, of themselves, to take notice of the usage; and the plaintiff had a verdict. *Gregory v. Christie*, 3 Dougl. 419; *Mobile Marine Dock, &c. Ins. Co. v. McMillan*, 27 Ala. 77. See also *Louisiana Mut. Ins. Co. v. New Or-*

the power of the court, under their right to construe all written documents. It is, however, more frequently given to the jury, — of course under instructions from the court as to the necessary evidence of usage.<sup>1</sup>

It is quite certain that where a usage is recent or local, it may still have sufficient force to affect the construction of the policy, if brought home to the knowledge and recognition of the parties. It must, however, be so brought home by adequate evidence.<sup>2</sup>

leams Ins. Co., 13 La. An. 246. From these cases it would appear that the usage of a single institution may affect a person who does business at the same. The general rule of law must be, that if the person is in the habit of transacting business there, so that he may be presumed to have knowledge of the usage, and to contract in reference to it, he is bound by it, but otherwise not. *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Ewing*, 1 B. & Ad. 605.

<sup>1</sup> In *Leach v. Perkins*, 17 Maine, 465, the court say: "Whether a usage is proved is a fact for the jury to find. But it would be the duty of the court to instruct them, that, if it was not proved to be certain and general, and to partake of the other requisites before stated, the testimony should have no influence upon the rights of the parties." But see per *Shaw, C. J.*, in *Winsor v. Dillaway*, 4 Met. 223: "We take the rule to be, that if the usage is so general, so uniform, and of such long continuance that every ship-owner might be presumed to be acquainted with it, then the jury might infer the fact of actual knowledge by the defendant. But such inference of knowledge would be a presumption of fact, and not of law, and therefore it would be for the jury, and not the court, to draw it."

<sup>2</sup> *Bartlett v. Pentland*, 10 B. & C. 760. Here a resident of Plymouth, and assured in the St. Patrick's Ass. Co. of

Ireland, employed a broker in London to recover a loss from the underwriters; and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums. It was proved that such set-off by custom at Lloyd's was considered as payment between broker and underwriter. The broker became bankrupt, and never paid the money to the assured. The case turned on the knowledge, on the part of the assured, of such custom at Lloyd's; and as he was not shown to be cognizant of it, or to have assented to it, it was held not binding upon him. Lord Chief Justice *Tenterden*, in delivering his opinion on this point, said: "As to the supposed usage at Lloyd's, the usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs." The policy was effected on horses warranted free from mortality and jettison. In the course of the voyage, in consequence of the agitation of the ship in a storm, the horses broke down a partition, and were so seriously injured by kicking and bruising each other that they all

Here, as elsewhere on the subject of construction, it may be difficult to give a definite, dividing rule. For example, how far is died. The jury upon the trial had found a certain usage at Lloyd's, where the policy was effected, by which the underwriters were not liable, under such a policy, for the loss claimed. But it was not found that the plaintiff was in the habit of effecting policies there. Held, that this usage was not sufficient to bind the plaintiff. *Rogers v. Mechanics' Ins. Co.*, 1 Story, 608; *Natchez Ins. Co. v. Stanton*, 2 Sm. & M. 340. Length of time is not a matter of so much importance as the uniformity of the usage during the time. Thus, in *Noble v. Kennoway*, Doug. 510, the trade had existed to the place in question but three years; yet it was held that the way in which it was carried on might be shown for the purpose of establishing a usage. And Lord *Mansfield* said: "It is no matter if the usage has only been for a year." Occasional instances will not constitute a usage of which parties are presumed to have notice. *Salisbury v. Townson*, Millar's Ins. 418; *Tennant v. Henderson*, 1 Dow, P. C. 324; *Martin v. Del. Ins. Co.*, 2 Wash. C. C. 254. See this case stated *ante*, p. 89, n. 1. During the trial, it was insisted, upon the evidence of one of the jurymen, who stated that he had known two vessels on this voyage call at Aruba to take in a supercargo to Coro for purchasing mules, that this was the course of the trade, and therefore it was permitted to call at Aruba to land this person. *Washington, J.*, in his charge to the jury, said: "The evidence given by the jurymen is very far from proving a usage of trade. Twenty instances may have occurred of vessels, not being otherwise acquainted with the traffic in mules on the Main, calling there to obtain such a person; and as many instances may have occurred of vessels proceeding with a supercargo, brought from the port of the vessel's departure, relying upon finding such a character at Coro. But this is no proof of a usage. It should appear that this course is uniformly pursued, and that it should be known as well to the underwriters as to the insured. The former must take notice of the usage of trade, but then it must be uniform and fixed." And accordingly there was a verdict for the defendants. *Trott v. Wood*, 1 Gall. 442, was an action of assumpsit for not transporting certain merchandise from Providence to New York, in a packet sloop belonging to the defendant. Part of the defence was, that, by the custom of the trade, it was lawful to transship the goods in another packet, without any special authority for that purpose. As to this point there was considerable testimony on each side. *Story, J.*, directed the jury that, as to the question of usage, in order to support that defence, it was not sufficient that a few instances could be produced in which masters in the trade had transshipped goods, and no objection had been made. "The course of the trade must be uniform and general, to entitle it to be considered as a legal defence. It should be so well settled, that persons engaged in the trade must be considered as contracting with reference to the usage." *McGregor v. Ins. Co. of Penn.*, 1 Wash. C. C. 39; *Scott v. Irving*, 1 B. & Ad. 605. In *Brittan v. Barnaby*, 21 How. 526, it was held that evidence of a practice at San Francisco, that a stamp on the back of a bill of lading should control the provisions of the bill itself, was not admissible, on the ground that, however general the practice might be, yet it was too recent to make a custom.

at the duty either of an insured or an insurer to acquaint himself with all existing usages in reference to the subject-matter of the contract? Here it can only be said, that, where usage is sufficiently well established, uniform, and notorious, neither party can be permitted to protect himself by allegation or even proof of his own ignorance of the usage.<sup>1</sup>

<sup>1</sup> "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it is recently established or not. If he does not know it, he ought to inform himself." By Lord *Mansfield*, in *Noble v. Kennoway*, Doug. 513. In *Maryland Ins. Co. v. Bossiere*, 9 G. & Johns. 121, the court say: "It is a well-established principle in the law of insurance, that the underwriters are presumed to be acquainted with the nature and course of the voyage which they undertake to insure."

Mr. Justice *Story*, in *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mason, 442, said: "Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to equipments of vessels of that class for the voyage on which she was destined." And in *Hazard's Adm. v. New England Mar. Ins. Co.*, 8 Peters, 582, Mr. Justice *McLean*, in delivering the opinion of the court, says: "The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political condition of foreign nations. Men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries. This knowledge is essentially connected with their ordinary

business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests." See authorities, *supra*, p. 91, n. 1. *Washington, J.*, in *McGregor v. Ins. Co. of Penn.*, 1 Wash. C. C. 39, said: "The custom of merchants is founded on general consent, and usage practised amongst merchants, and may or ought to be known by all who enter into negotiations within the influence of this law. The usage of a particular trade is supposed to be known by those who engage in that trade; it is or ought to be equally well known by the person who insures it against the risks incident to that trade, as to the person engaging in it." See the remarks of Lord *Eldon*, in *Ougier v. Jennings*, 1 Campb. 505. So it was held that the topography of places mentioned in the policy must be known, and every underwriter takes upon himself to be acquainted with it. The insurance was on a vessel from New York "to the port of Sisal" in Yucatan. There are no *ports*, properly speaking, at any of the places along that coast, but merely open *roads*, which, though called *ports*, are not harbors. It was held that the word *port* used in the policy must be taken in reference to the subject-matter, and meant, as applied to Sisal, only a *road* or anchorage-place, and that the insured was not bound to inform the insurers of these facts, as they must be presumed to know the nature and situation of the places to which the contract relates. *Kent, C. J.*, said: "These are general topics of knowledge

But, on the other hand, it cannot be true that either party is bound to be industrious in acquainting himself with all the usages which are springing up about him. Nor does he act upon the responsibility of knowing all such usages. Nor is he to be affected by the mere possibility, or even the probability, of his knowing them.<sup>1</sup>

Another rule of like kind and effect is, that no usage can be relied upon which opposes either a rule or a principle of law.<sup>2</sup> By

of which every underwriter takes upon himself to be informed. They are matters of fact and of general notoriety, equally open to the knowledge of both parties, and which both must be presumed equally to know." *De Longue- mere v. New York Fire Ins. Co.*, 10 Johns. 120. So it has been held that underwriters, insuring by certain words, are bound to know the mercantile meaning of the words, and are liable according to that meaning. *Astor v. Union Ins. Co.*, 7 Cow. 202; *Wall v. Howard Ins. Co.*, 14 Barb. 383.

<sup>1</sup> In *McGregor v. Ins. Co.*, 1 Wash. C. C. 39, cited above, it was attempted to establish the custom in Philadelphia to strike off *one third* of the *gross* freight for charges, and to pay *two thirds* only to the assured in a policy on freight where a total loss has occurred. But the court held it to be unreasonable, and in direct opposition to the terms of the policy, and inadmissible. A number of witnesses swore to the fact of the existence of such a usage for twenty or thirty years back, and that it was uniform. Mr. Justice *Washington*, after stating the general rule to be that underwriters must know usages of the trade insured, proceeds: "But that which is called a usage in this case is nothing more than a rule established by a particular class of men to control a contract entered into by them with others not privy nor consenting to the rule, and who are and

can be under no legal obligation to know of its existence. I will not say that, if both parties consented, the assured might not bind himself to agree to such a mode of adjustment, or that if the assured knew of the rule, and that it was uniform, he would not be bound by it under an implied consent. But I hold it necessary that notice to the assured of such a rule should be proved, or the evidence should be such that the jury might fairly presume it." See also per *Story, J.*, in *Rogers v. Mechanics' Ins. Co.*, 1 Story, 607: "If the usage or custom be not notorious, if it be partial or local in its existence or adoption, if it be a mere matter of private and personal opinion of a few persons engaged therein, it would be most dangerous to allow it to control the solemn contracts of parties who are not or cannot be presumed to know it or to adopt it as a rule to govern their own rights or interests."

<sup>2</sup> *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137, affirmed *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235. *Sandford, J.*, said: "We find it clearly settled that a general usage, the effect of which is to control rules of law, is inadmissible. So, of one which contradicts a settled rule of commercial law." And accordingly it was held that a usage that a re-insurer should pay to the first insurer only so much of the sum re-insured as bore the same proportion to the prop-



this it is not merely meant that any illegal contract is void, and that an illegal usage cannot be sanctioned by the court, but that

erty destroyed, which was covered by the first insurance, as the whole re-insurance bore to the original insurance, was inadmissible.

Evidence of a usage in Boston to return a portion of the premium where the insurance is "on cargo from Boston to — (*Archangel* in this case) and back to Boston, and the vessel comes back empty," was held inadmissible. The court say: "The usage of no class of citizens can be sustained in opposition to principles of law." A note attached to the report of this case says: "It is said that this decision has never been acted upon. The practice in Boston remains unchanged." *Homer v. Dorr*, 10 Mass. 26. A usage for a master to sell a cargo without necessity, is invalid on the ground of illegality. *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131. So it is illegal for the owner to purchase it, when sold by the master through necessity, and a usage justifying such a proceeding is invalid. *Robertson v. Western Fire & M. Ins. Co.*, 19 La. R. 227. Per *Mansfield, C. J.*, in *Edie v. East India Co.*, 2 Burr. 1216. If the policy does not contain words which would by construction of law cover the interest of the assured, a usage to show that the words used are considered as equivalent to "for account of whom it may concern," or words of similar import, is not admissible. *Turner v. Burrows*, 5 Wend. 541; 8 Id. 144. See the remarks of Chief Justice *Shaw* in *Eaton v. Smith*, 20 Pick. 156. And per *Kent, C. J.*, *Frith v. Barker*, 2 Johns. 335. See also *Dow v. Whetten*, 8 Wend. 168; *Bargett v. Orient Ins. Co.*, 3 Bosw. 397. See this case stated *ante*, p. 85, n. 1. *Bosworth, J.*, in delivering the opinion, says: "Independent of other objections

to the evidence offered to show the meaning of the words 'free from average,' it is sufficient to say that evidence of such a character is not admissible for the purpose of attaching to these words, when forming part of a written contract, a meaning in conflict with, or variant from, that given to them by adjudged cases, by which their meaning, in precisely such contracts, has been determined and was a point in judgment. No usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the settled law of the State has adjudged them to be, on a contract in the terms of the one sought to be affected by such evidence." As it is a rule of law that a policy of insurance made in the name of a particular person will not cover and protect the interest of any person other than the one named in the policy as the assured, unless the words "for whom it may concern," or other equivalent words, indicate that it is intended that the interest of such other person should be covered by the same; a custom or usage cannot be permitted to contravene this rule. *Wise v. St. Louis Mar. Ins. Co.*, 23 Mo. 80. In *Eager v. Atlas Ins. Co.*, 14 Pick. 141, 145, the question to be considered was, whether, in adjusting a partial loss on a vessel, after repairs made, the deduction of one third from the whole expenses of the repairs is to be made for the substitution of new materials and work for old; or whether the proceeds of the old materials not used in the repairs should be first deducted, and the one third be taken from the residue; and the latter was held to be the law. And it was further held, that a usage at a particular place to make the deduction of one third new for old



if terms have received by definite adjudication a fixed and definite meaning, no usage will be permitted to show that the parties had another meaning.<sup>1</sup> The reason of this is, that the legal determination of all questions of insurance is founded upon usage, and is the most conclusive evidence of usage, and while this reason explains the rule, it also defines its limits; as it confines the effect of this rule to that part of the "custom of merchants" which has become a part of the common law.<sup>2</sup> It has been said by high authority, that "if the terms employed have received a settled legal construction, that must govern, and no evidence of a particular custom or usage in opposition to such a legal construction can be received."<sup>3</sup> We apprehend that in this remark a distinction is lost sight of between law properly so called and the mere result of decisions as to the meaning of words. Usages continually vary, and do certainly change from time to time and differ in different places. Now the question always is, What did the parties intend by the words they used? and next, Were the words they used sufficient to express their intention? To answer the first question, usage, if sufficiently notorious and established may certainly be resorted to to determine their intentions; and to answer the other question, a customary employment of these words to express this meaning would certainly justify the parties in employing them for their purpose.

It is always important to determine by what evidence a usage is proved, and here a strong distinction between a usage and the mere opinions of witnesses is taken.<sup>4</sup> This distinction cannot be

from the gross amount of expenses of repairs could not control this general principle of law in the construction of a policy containing no reference to such usage. And, moreover, that such usage is unreasonable and cannot be sustained, because it is opposed to an established rule of law, and to the essence of the contract of insurance, which is a contract of indemnity.

<sup>1</sup> See *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7.

<sup>2</sup> In *Edie v. East India Co.*, 2 Burr. 1226, it is said: "The custom of mer-

chants, or law of merchants, is the law of the kingdom, and is part of the common law"; and similar language has been repeatedly used.

<sup>3</sup> Per *Walworth*, Chancellor, in *Dow v. Whetten*, 8 Wend. 160.

<sup>4</sup> 1 Arn. Ins. (Perkins's ed.) 75, note. 1 Duer, Ins. 180 *et seq.* 186, where this subject has received the fullest treatment. In *Turner v. Burrows*, 8 Wend. 144, the plaintiff offered to prove a certain usage in regard to the wording of policies. But the court refused it, saying: "We are inclined to think this was an offer to prove what the law is by

better illustrated than by the course of Lord Mansfield on the subject. It is well known that it was his constant practice to

the opinions of commercial men, which certainly is not admissible." Per *Curiam*, in *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 10. In *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603, evidence was offered of a supposed usage that blubber was not an insurable interest, but was refused. In the course of the opinion Mr. Justice Story says: "If the usage or custom be a mere matter of private and personal opinion of a few persons engaged therein, it would be most dangerous to allow it to control the solemn contracts of parties. Not a single witness has spoken of his knowledge of any such general custom or usage. On the contrary, all of them deny any knowledge of such usage or custom, and only speak of their own opinions how the interpretation of the language of the policy ought to be, and is understood by them personally. But this court has nothing to do with the private opinions of witnesses." And see per *Tilghman*, C. J., in *Gordon v. Little*, 8 Serg. & Rawle, 549: "Where evidence of usage is admitted, the witnesses are confined to the fact of usage, and are not allowed to give their opinion. This is the law, established by the best authority. We refer to the following cases: *Abbott*, Part 3, c. 4, sec. 2; 2 *Marsh.* 207, note; *Winthrop v. Union Ins. Co.*, C. C. U. S. R., April Term, 1807; *Ruan v. Gardner*, 2 *Marsh.* 708, note; *Frith v. Barker*, 2 *Johns.* 327. See, also, as to the admission of opinion generally, *Crofts v. Marshall*, 7 *Carr. & P.* 597. In the great case of *Carter v. Boehm*, 3 *Burr.* 1905, which was an action upon a policy underwritten by Mr. Charles Boehm, the insurance being made by the plaintiff for the benefit of his brother, Governor George Carter, the question was,

what degree of concealment will avoid a policy of insurance. The case was tried before Lord Mansfield at Guildhall, and a verdict was found for the plaintiff by a special jury of merchants. The defendant moved for a new trial upon the objection "that circumstances were not sufficiently disclosed." He relied partly upon the cross-examination of the broker who negotiated the policy, "That, in his opinion, certain letters ought to have been shown, or the contents disclosed; and, if they had, the policy would not have been underwritten." But Lord Mansfield, in delivering the decision of the court, says: "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is a mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." So in *Durrell v. Bederley*, 1 *Holt*, N. P. C., 283, the opinion of underwriters was offered in evidence, whether, upon certain facts being communicated to them, they would have insured or not the particular voyage. And the same doctrine as in the case of *Carter v. Boehm* was laid down by *Gibbs*, C. J., though he received the evidence on great pressure. He said: "The opinion of underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence. Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I

consult merchants upon questions of insurance law that came before him; in such cases the jury was almost always a special jury composed of merchants, and he seems to have frequently consulted the jury itself, and paid very great respect to mercantile usages when proved. He was, however, almost severe in his refusal to permit mere opinions to be given. In one case he said: "This was merely a question of construction upon the face of the policy, and, unless a usage could have been shown in the favor of this desultory cruising, calling witnesses to support it was calling them to swear to mere opinion. . None of those produced knew of any instance, and therefore their evidence ought not to have been received." <sup>1</sup> It is quite obvious that Lord Mansfield here required the usage to be proved by evidence of cases which had occurred in conformity with it, and rejected evidence which amounted to no more than the opinion of the witnesses that such a usage existed. Our notes will show that this distinction between usages and opinion has been strongly insisted upon both in England and this country. In practice, however, the distinction is not, we think, rigorously applied. If none of the witnesses called knew of any

think it ought not to be received. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." And in *Campbell v. Rickards*, 5 B. & Ad. 840, overruling *Rickards v. Murdock*, 10 B. & C. 527, the action was brought by a merchant residing in New South Wales, against his correspondent in London, for negligence in effecting a policy of insurance, by means of which the plaintiff was prevented from recovering against the underwriters. The negligence consisted in the defendant's concealing from them, at the time of effecting the policy, a material fact within his knowledge.

Held, that the evidence of underwriters and brokers was not admissible to show, that in their opinion the matters not communicated were material. *Denman*, C. J., delivered the judgment of the court; in the course of his remarks he says: "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another." See also *Syers v. Bridge*, Doug. 527; *Astor v. Union Ins. Co.*, 7 Cowen, 215; 2 Pars. Cont. (5th ed.) 543, and cases there cited.

<sup>1</sup> *Syers v. Bridge*, Doug. 530. And see *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72.

instance in which such a case occurred, it is not probable that they would, anywhere, be held as having proved the usage, however confident they were that it existed, but where some instances of mercantile usage are proved by witnesses who are merchants or insurers, it is not uncommon to strengthen this evidence by inquiring of other similar witnesses as to the existence of the usage generally.

It may be said that they would be asked as to their knowledge of its existence, and not as to their mere opinion ; but on such a subject it would be difficult to distinguish precisely between knowledge and opinion, for, however a witness asserts his knowledge, he could mean by this little more than that it was his strong and undoubting opinion or belief.

It would seem to be certain that the mere narrowness of the usage is not a sufficient reason for excluding it.<sup>1</sup> It may relate to one special branch of trade, or to one only of the things which are the subject-matters of that branch of trade, as, for example, in a case in New York, the exact meaning of the word "skins" in the branch of trade which related to them ; for if the usage was sufficiently clear and certain, in relation to that particular matter, there would seem to be no reason why usage should not determine the meaning which the parties gave to that word in that contract.<sup>2</sup>

It is also said that the usage offered must be in itself a reasonable one.<sup>3</sup> This rule has sometimes been strongly insisted upon.

<sup>1</sup> See *Gabay v. Lloyd*, 8 B. & Cressw. 793, and other cases cited *supra*, p. 91, n. 1, where the usages, for example, of a single institution was held to affect persons dealing with the same. And cases p. 77, n. 1, *supra*.

<sup>2</sup> *Astor v. Union Ins. Co.*, 7 Cowen, 202. The court in this case say: "But it was contended that the offer, and the evidence which followed, were too narrow, being confined to the particular trade in fur or fur skins, whereas the usage should be of trade generally. No case was cited, nor do we think the argument warranted upon principle. The phrase "usage of trade" implies a restriction to that class of merchants who

deal in the article. Beyond that circle there can be no usage, such as was sought to be established. To sustain the objection would, therefore, be at once to overrule the cases which allow a usage to be proved at all. The evidence was properly received."

<sup>3</sup> 1 Phill. Ins. 88, *Macy v. Whaling Ins. Co.*, 9 Met. 363, where the court, per *Hubbard, J.*, says: "To be enforced by law, a usage must be reasonable in its provisions. For though usages apparently unreasonable may have been so long continued as to have acquired the force of law, yet the unreasonableness now apparent may have grown out of changes occurring after the usage was

It cannot, however, be supposed that a usage would become established among merchants which was in itself foolish or mischievous, which is what might be meant by unreasonable. The

established. But however that may be, when the question is first presented, as to giving legal effect to a usage proved to exist, where its binding force, or proof of its admissibility, is denied by one of the parties to the suit, the court will not enforce it, or give it the sanction of law, unless it be reasonable and convenient, and adapted not only to increase facilities in trade, but to the promoting of just dealings in the intercourse between parties." *Leach v. Perkins*, 17 Maine, 462; *Barney v. Coffin*, 3 Pick. 115. This was an action of assumpsit. By the shipping articles of a whaling-ship the seamen were to have shares of the net proceeds of the oil to be obtained, in lieu of wages. According to the usage of that business, the master supplies the seamen, when abroad, with necessary clothing, and retains from their shares respectively the amount advanced; and this, whether they return in the ship or desert, and whether their shares are or are not assigned. Held, that this was a reasonable usage, *Parker, C. J.*, saying: "Nothing can be more reasonable, and indeed necessary, than that in voyages of this sort, which are prosecuted from pole to pole, and through almost every climate, the wants of the seamen should be supplied; and if there were no security upon their earnings, there would be nobody to advance." And it seems that, even where the usage is proved to have existed for twenty or thirty years, if it is unreasonable the court will reject it. *McGregor v. Ins. Co of Penn.*, 1 Wash. C. C. 39, where the alleged custom in Philadelphia, to strike off one third of the gross freight, for charges, and to pay two thirds only to the assured, in a policy

on freight, where a total loss has occurred, was held to be unreasonable. *Ougier v. Jennings*, 1 Campb. 505, per Lord *Eldon*; 1 Duer, Ins. 268: "It must not lead to consequences that could not have been contemplated by the parties, thus repelling the presumption that they meant to adopt it as the basis of their contract." *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131, where a usage was rejected as "unreasonable, unnecessary, and unlawful." In *Collings v. Hope*, 3 Wash. C. C. 149, the defendant proposed to ship a parcel of coffee to the house of the plaintiffs at Rotterdam. The agent of the plaintiffs in Philadelphia, who was in the habit of procuring consignments to his principals, and of making advances on the shipments, agreed to make the usual advance, and drew a bill on the house in London in favor of the defendant, which was duly paid. The vessel and cargo were lost; and this action was brought to recover back the advance thus made. The defence was, that, according to the usage at Philadelphia in similar cases, it was the duty of the agent to have had insurance effected on this property; and this not having been done, the plaintiffs were liable as if they had themselves been the insurers. *Washington, J.*, charged the jury: "The usage now set up is an unnatural one; for although the shipper may consent to let the agent make the insurance, yet in general he would prefer making his own bargain." 2 Pars. Cont. (5th ed.) 545 and note (v). See *Reed v. Richardson*, S. J. C., Mass., Dec. Term, 1867.

meaning of the rule must be, that, where a certain usage, if applied to a certain case, would either destroy the indemnity of the insured, or leave him unprotected against risks which it was obviously the intention of the parties to cover, or if, on the other hand, it would give to the insured rights or indemnities which it is impossible to suppose that a rational insurer could have contemplated granting him, in either case it must be "unreasonable" to believe that the parties included this usage in the terms of their bargain. And that belief is all that gives admission to evidence of usage. The reasonableness of a usage would seem to us to be quite often a question of fact; for it is a question of the practical effect of the usage on the facts of the case, or upon the parties under those facts, and so it seems to have been considered.<sup>1</sup>

There is, however, one point of view in which it may be said that a usage may be unreasonable in itself; for there may be a local usage so foolish or wrongful that no court would permit any rights to be founded upon it. For example, nothing is more certain than that, when a vessel is wrecked, it is the duty of the master to transport the cargo to its place of destination, if he can do so; and, at all events, to preserve it carefully, and place it at the disposal of its owners, unless it be perishable, or a sale of it be justified by some other necessity. And when a vessel was wrecked on the coast of Virginia, and the master sold the cargo at once on the beach, and there was an attempt to justify this sale by evidence of the known and established usage of the place where the wreck and sale occurred, the evidence was rejected, and with very emphatic language. The court said: "Such a usage is of no validity. It could not have had a lawful commencement or continuance; it was against common faith and honesty. A usage to sell without necessity is of no more validity than a usage, that when a vessel takes the ground, the master and crew may turn pirates."<sup>2</sup>

<sup>1</sup> In *Ougier v. Jennings*, *supra*, Lord *Eldon* gave it to the jury as fact to determine whether a custom was reasonable. Mr. Duer seems to think (1 Duer, Ins. 269) that, judging from analogy, it would be a question of law. Perhaps the distinction may be stated thus: It is for the court to lay down what in general is required to make a usage reasonable, or what would make it un-

reasonable, while the jury would decide whether the usage in question comes within the one or the other of these definitions, under all the circumstances and facts of the particular case. But we think there is much ground for regarding, with Mr. Duer, the whole question as one of law.

<sup>2</sup> *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131, per *Putnam, J.*



A distinction is, however, to be taken here. A policy by which the insurers undertake to indemnify the insured against his own acts, when those acts, as described in or implied by the policy, are in violation of law, would certainly be void. The insurers themselves do not contract to do an illegal thing; but their contract would protect and sanction illegal acts which no usage could make legal. It is not so, however, in regard to the acts of the agents of the insured. When we come to treat of Barratry and some other topics, it will be seen that insurers may insure any party against loss arising from the unauthorized acts of the master.<sup>1</sup> This agreement on their part may be proved, either by express words or by a sufficiently established practice in interpreting the contract or in admitting the liability of the insurers for such losses. But where there is an illegal act, and a loss resulting from it, and no words of the contract, and no established practice, cast this loss on the insurers, they cannot be made liable by evidence that this illegal act was in accordance with an illegal usage.

As the usage may be very narrow and yet sufficient, so it may be sufficient, although of recent origin.<sup>2</sup> There may be some peculiar branch of trade established for only a short time, and

<sup>1</sup> See this subject noticed 1 Duer, Ins. 274, 275. Where the master commits barratry, selling vessel and cargo for his own benefit, the insurers have been held to bear the loss. *Dixon v. Reid*, 5 B. & Ald. 597.

<sup>2</sup> See the remarks of Lord *Mansfield* in *Noble v. Kennoway*, Doug. 513, where the trade had existed to the place in question but three years, yet it was held that the way in which it was carried on might be shown for the purpose of establishing a usage. Mr. Duer, in speaking of Lord Mansfield's language in this case, says: "Generally speaking, it can rarely happen that a custom of such recent origin and short duration as a single year can have become invested with the qualities that constitute its necessary title to the character and name of a legal usage. Of such a usage it cannot often be predicated, with truth,

that it is either general or uniform or notorious." 1 Duer, Ins. 266. So also the language of the court in *Smith v. Wright*, 1 Caines, 43, is often quoted, that "the true test of a usage is, its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it." This latter clause appears to us to contain the gist of the rule; if, therefore, a usage is sufficiently known to those engaged in the trade in which it is sought to establish it, to warrant the inference that it entered into the contract, and that the contract was made in reference to it, the length of time would seem to be of small moment. It is not, however, sufficient to constitute a usage, that there are some instances of a thing being done in a particular trade. See *ante*, p. 93, n. 2.



between two certain places ; but it may still be possible to show that ever since this trade has existed it has been conducted in a certain way, and this may be proved so conclusively, as to lead to the conviction, that all those who pursue that trade pursue it in that way, and mean the same thing by the terms employed in that trade ; and that this was so well known when and where the contract of insurance was made, that it must be considered to have been adopted and acted upon by the parties to the contract. Such a usage, in a certain very limited branch of trade, was permitted to have this effect, where the trade itself had existed only three years. In the same case a still greater latitude was given to the evidence of usage. The defence was, that the loss had arisen from an unnecessary delay in unloading the cargoes. The plaintiffs justified the delay, by the usage of the trade. The vessels were employed in fishing on the coast of Labrador. The plaintiffs called a witness to prove the usage of trade at Newfoundland. This would seem incompetent to prove a usage of trade at Labrador, but it was admitted.<sup>1</sup>

A distinction has been taken of this kind. A loss has occurred under circumstances which generally would discharge the insurers, on the ground that it arose from risks which were not contemplated. A usage of trade is proved which showed that these risks were proper to this trade, and were known to be so. The question then arises whether this is sufficient, or whether the plaintiffs must go further, and show a usage on the part of the insurers to pay for such risks. This has been asserted in a few cases ; we cannot think, however, that the rule or principle can be regarded as established. In one case it was applied, where steamboats were employed to tow vessels up and down the Mississippi. A loss occurring, the usage was proved ; but the court held that the insurers were not affected by it, in the absence of evidence of a usage on their part to pay for such losses.<sup>2</sup> In another case, goods carried on deck, in opposition to a rule of the law-merchant, were lost ; and, in an action against the insurers, proof was offered

<sup>1</sup> *Noble v. Kennoway*, 1 Doug. 510, referred to in preceding note.

<sup>2</sup> In *Hermann v. Western M. & F. Ins. Co.*, 13 La. 516, it was held, that although it might be usual for steam-

boats to tow vessels up and down the river, yet that this could have no effect upon the insurers, there being no evidence of a usage for them to pay in such a case.

of a well-established custom to carry goods of that kind upon that voyage in that way, and that they had been very often insured, or at least premiums paid for them, with a knowledge of the custom; but no instance was shown of a loss of such goods when under insurance, and therefore no usage could have existed of the insurers paying for such losses; but the court held that the former usage, without proof of the usage of payment, did not make the insurers liable.<sup>1</sup> We think it open, however, to question whether a loss is not fixed upon insurers, when it is shown that a certain custom of trade exists which is itself neither unreasonable or illegal, and is known to the insurers; and they have received their premiums for insurance of goods, knowing that this usage existed, and that the goods insured were exposed to the risks which belong to this usage.

In one case there seems to be some disposition to give the effect of usage to a mere statement in writing made by the insured.<sup>2</sup>

<sup>1</sup> *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108, which is a case relating to the liability of insurers when goods were carried on deck according to the usage of trade. The court held that the defendants have not assumed the risk, and cannot be held liable on the usage proved, unless it be also proved that they were in the habit of paying for such losses. "But," say the court, "to look more nearly to the usage proved in the case, it does not follow that because goods not liable to be injured by dampness are usually carried on deck, that it is usual for underwriters to pay for them. The usage stops, in *limine*, or at most, is only one step in the journey. . . . The usage does not find that underwriters have, in a single instance, ever paid a loss upon goods carried on deck, unless there has been a special contract, or unless, from the nature of the property, the underwriters were, by law, to be presumed to have undertaken that particular risk."

<sup>2</sup> *Urquhart v. Barnard*, 1 Taunt. 450. An action was brought on a policy on

goods, the vessel having liberty to touch at a place. A letter was shown to the underwriters at the time of effecting the insurance, in which it was stated that the vessel would touch at the port mentioned, for the purpose of taking in salt. Lord *Mansfield*, C. J., held that the letter was admissible, on the ground that if a custom had been shown, to stop at the port for the purpose of taking in salt, there would have been no deviation, because if the underwriters knew of the custom, the insured were entitled to it. And that if the underwriters knew that the insured intended to stop there, it was the same as if they had notice by the general usage of trade. He said: "The letter is not made use of to vary or contradict the policy, it only shows that the underwriters knew the purpose of going there; it therefore shows that there was no deviation from the course of the voyage intended and insured." We think, however, that this case cannot be supported to the extent of holding that if the assured tells the underwriter that he means to go to

From the case as given in our notes it will be seen that this view was in no wise necessary for the decision. The remark of the judge is, that if the underwriters knew that the general custom of the trade included a certain thing, then the insured had the right to do that thing; and if the insurers had a knowledge of the purpose of the insured to do that thing by means of an express communication from him, it is the same thing as if the insurers had notice by the general usage of the trade. This cannot be true as a general principle; for if it were, the insured has only to state his purpose of doing something under a policy, and by that statement he would create a usage for himself. Of the effect of such a statement under the rules of law respecting representations of the insured we treat in the chapter on that subject.

#### SECTION VI. — *Of Parol Evidence.*

THE question, under what circumstances and to what extent parol evidence may be received to affect the construction of a written contract, is one which belongs to all written contracts; and we do not know of any reason or principle which would draw a material distinction between contracts of insurance and other written contracts; although it may be true that practice and adjudication have settled some of the subordinate questions under this general question, in reference to policies, with great certainty.<sup>1</sup> In some cases there seems to be a disposition to treat policies as if they were specialties. In one case in Massachusetts, Chief Justice Parker said: "Although policies of insurance are not technical specialties, not being under seal, they have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties."<sup>2</sup>

a place, and then a policy is made out to a different place, he can go to the place he spoke of, and be covered by that policy. It is not strengthened by comparing it to the knowledge of a usage. For if there is a usage, the assured has a right to avail himself of it. But if there is not, he certainly cannot

make one merely by declaring to the underwriter that it exists. See *Astor v. Union Ins. Co.*, 7 Cowen, 202.

<sup>1</sup> See pp. 65, n. 1, 67, n. 2, 85, n. 1, *supra*, and subsequent chapter on Representations.

<sup>2</sup> *Higginson v. Dall*, 13 Mass. 96.

We are not aware that rules either of construction or evidence, applicable only to specialties, have been applied to policies, which would not have been applied to other simple contracts. Nor was this remark necessary for the conclusion to which the court came.<sup>1</sup> In the same case the Chief Justice adds: "The policy itself is considered to be the contract between the parties; and whatever proposals are made or conversations are had between the parties, prior to the subscription, they are to be considered as waived if not inserted in the policy, or contained in a memorandum annexed to it."

This is the universal rule of all written contracts, and it rests upon an obvious reason. If parties negotiate respecting any transaction either orally or in writing, and thereafter enter into a written contract in relation to it, the law supposes always, what is usually the fact, namely, that the negotiation has led the parties to an agreement as to the terms of the contract, and that the written agreement expresses those terms.<sup>2</sup> It may be said that the

<sup>1</sup> "By *written evidence*," says Prof. Greenleaf, in speaking of the admissibility of parol or verbal evidence to affect that which is written, "is meant, in this place, not everything which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions." 1 Greenl. Ev. 327. It is quite certain that the exclusion of parol evidence does not apply only to specialties, and in this case, for this purpose, there seems to have been no occasion for the comparison.

<sup>2</sup> *Higginson v. Dall*, *supra*; *Weston v. Emes*, 1 Taunt. 115, where it is held that parol evidence of what passed at the time of effecting the policy is not admissible to restrain the effect of the policy. The court say, that the evidence could not be admitted without abandoning in the case of policies the rule of evidence which prevails in all other cases, and that it would be of the worst

effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected. In *Bates v. Graham*, 2 Salk. 444, a case is cited by Lord Holt, as decided by *Pemberton*, C. J., that on an insurance from Archangel to the Downs, and from thence to Leghorn, parol evidence was admitted to show that it was agreed the voyage should not commence till the ship came to such a place, and that the policy was avoided according to the terms of the parol agreement. But in *Weston v. Emes* this case was denied to be law. See also *New York Ins. Co. v. Thomas*, 3 Johns. Cas. 1; *Mumford v. Hallett*, 1 Johns. 433; *Vandervoort v. Smith*, 2 Caines, 155; *Lee v. Howard F. Ins. Co.*, 3 Gray, 583; *Ewer v. Washington Ins. Co.*, 16 Pick. 502; *Whitney v. Haven*, 13 Mass. 172; *New York Gas-Light Co. v. Mechanics' Fire Ins. Co.*, 2 Hall, 108; *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419; *Finnly v. Bedford Commercial Ins. Co.*, 8 Met. 351; *Holmes v. Charlestown M.*

policy of the law seeks to induce parties, when they have agreed upon terms, to express them in writing. An oral contract suf-

& F. Ins. Co., 10 Met. 211; *Halhead v. Young*, 6 Ellis & B. 312, 36 Eng. L. & Eq. 109. Where the terms of a policy are clear and explicit, the court will not hear any suggestion or proof of mistake; as that an insurance on freight *generally* was intended to cover freight *earned*. "If any mistake has been made it is not to be corrected here." *Cheriot v. Barker*, 2 Johns. 346. The subsequent admissions or statements of the parties cannot be offered in evidence to vary the written contracts. See *Paine v. M'Intier*, 1 Mass. 69; *Leland v. Stone*, 10 Mass. 459; 1 Phill. Ins. 50. Representations, however, of the state of the vessel, and giving a description of the voyage, may be proved by oral or written testimony, when the object is to falsify those representations; for many things material to the risk are stated in the application for insurance which are not usually made a part of the policy; and it is a part of the law of insurance that such representations may be so proved, as we shall see in the chapter on Representations. See further, as to the point in the text, *Alston v. Mechanics' Mut. Ins. Co. of Troy*, 4 Hill, 330, where the insured, on making his application, promised the underwriters verbally that he would discontinue the use of a fire-place in the basement, if they accepted the risk, and use a stove instead. He did not perform his promise, in consequence of which the building was burned. Held, no defence to an action on the policy. The opinions of *Walworth*, Ch., and *Bockee*, Sen., in this case, enter fully into the examination of this rule. In the course of the opinion of the latter it is said: "The promise being out of the policy, it is no more than a conversation between the parties, inadmissible as evi-

dence of their rights under this written contract. If it was material to the risk, it was material that it should be inserted in the policy." Neither will a paper shown to the underwriters at the time of signing, in which the number of men and guns on board was stated, be regarded as part of the policy, or enter into its construction. *Pawson v. Ewer*, Doug. 12, n., nor where it stated that the vessel had deviated from the voyage described in the policy, before the insurance was effected. *Redman v. London*, 3 Campb. 503. And where the policy was on "the Spanish ship," &c., parol evidence was not admitted to show that the underwriters had been told she was American. *Atherton v. Brown*, 14 Mass. 172. Where the policy, by the construction put upon it, covered goods only on one trip, evidence that the president orally agreed that the insurance applied to shipments on two successive trips was held inadmissible. *Courtney v. Miss. Mar. & Fire Ins. Co.*, 12 Louis. 233. It should be noticed in this case, that the company's charter required policies to be signed by the president and countersigned by the secretary, and sealed. This excluded the attempted argument to consider the second policy as a new and verbal one. *Wiggin v. Boardman*, 14 Mass. 15; *Ewer v. Washington Ins. Co.*, 16 Pick. 502. The stipulations implied by the legal constructions of the expressions of the policy are equally parts of it, as if specifically written. *Potter v. Ontario & Livingston Mut. Ins. Co.*, 5 Hill, 147, per *Bronson*, J.: "Thus it is an always implied condition of every policy, that the ship, in proceeding from one terminus to the other, shall pursue the usual manner of making the voyage, without any

ficiently proved has the same force and effect as if it were in writing, unless where the statute of frauds interferes. And as it was the purpose of this statute, in reference to certain agreements, to avoid the danger and uncertainty of oral evidence, so it may be said that the policy of the law favors written contracts generally, by refusing to permit them to be varied by parol evidence. Such is the rule as commonly expressed. A written contract not under seal is only a parol contract, and written notes or memoranda passing while the negotiation went on can no more be received to vary the final agreement than mere oral expressions.<sup>1</sup> The rule

delay or deviation; this implied condition is generally termed a condition not to deviate, any failure to comply with which exempts the underwriter from all liability from the moment of deviation." See subsequent chapter on Deviation.

<sup>1</sup> Thus it is held, that the slip, or application for insurance, is not admissible to aid in the construction of the policy, except in the case of a latent ambiguity or misrepresentation. *Dow v. Whetten*, 8 Wend. 160. The court in this case give in a few words the whole law on this point, as well as the reason for it: "In this case it seems to me the slip was a memorandum of the contract which was executed in form by the policy itself; to produce the slip, therefore, to control the policy, is reversing the proper order of events. Nothing is better settled than that parol evidence of what was intended by parties previous to entering into a written contract cannot be given in evidence to control or qualify such written contract. If any difference exists between the slip and the policy, the latter being the completion of the contract, must be taken to express the true intention of the parties. *Vandervoort v. Smith, President, &c.*, 2 Caines, 155, was an action of assumpsit on a policy of insurance on the cargo of the schooner *Four Sisters*, "at and from

New York to two ports on the coast of Brazil." It was the practice of the Columbian Insurance Company to oblige the underwritten, on all occasions, to commit to paper their applications for insurance, to which written answers were returned. These applications and answers the defendant attempted to introduce in evidence; but it was held that where a policy is clear, certain, and unambiguous as to the voyage insured, propositions asking the rate of insurance for another voyage cannot be resorted to as representations to show the voyage insured was meant to be restricted to that described in the proposition. *Thompson, J.*, said: "Supposing there had been no evidence whatever offered of any communications between the parties, previous to the signing of the policy, would it have been void for uncertainty? Clearly not; the legal construction in such a case would have been to two ports on the coast of Brazil, at the election of the assured. The writing offered to explain the course of the voyage could not be received as a representation within the rules of law. This writing must, we think, be viewed in the light of a series of propositions made on the one side, and answers given on the other, leading to a contract to be consummated by the policy, and intended to serve as a memorandum,



really means that a written contract is not to be varied by evidence from without itself.

There is still, however, when evidence is offered for this purpose, one important distinction between such evidence when written and when only oral. A written memorandum may be such, and so referred to in the contract, as to make it substantially a part of the contract, although it be not so formally.<sup>1</sup> But we are aware of no case and no practice in which a mere reference in a written contract to oral statements has the effect of making these statements a part of the contract,<sup>2</sup> although they might have an important effect if fraud<sup>3</sup>

whereby to fill it up, and must fall within that very salutary rule of law, that where an agreement is *reduced to writing, all previous treaties are resolved into that*. To admit a loose and almost unintelligible memorandum in any manner to control the policy, appears to us to lead to too great uncertainty, especially as it is stated in this case that several personal communications took place between the parties previous to the signing of the policy." But see, *contra*, *Morris v. Ins. Co. of North America*, 3 Yeates, 84.

<sup>1</sup> If a separate document be distinctly referred to and identified, it is embraced within the contract, and is in effect a part of the policy. *Routledge v. Burril*, 1 H. Bl. 254; *Wood v. Worsley*, 2 Id. 574; *Worsley v. Wood*, 6 T. R. 710; *Tarleton v. Staniforth*, 5 T. R. 695; 1 B. & P. 471. So the application, if thus referred to, forms part of the policy. *Clark v. Manuf. Ins. Co.*, 8 How. 235; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 5 Hill, 188; *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. 285; *Kentucky & Louis-*

*ville Mut. Ins. Co. v. Southard*, 8 B. Monr. 634; *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. 280. But see *Williams v. New England Mut. F. Ins. Co.*, 31 Maine, 219. The application is sometimes expressly made part of the policy. *Allen v. Charlestown Mut. F. Ins. Co.*, 5 Gray, 384. Thus in *Clark v. Manuf. Ins. Co.*, *supra*, the policy purported to have been "made and accepted upon the representation of the said assured contained in his application therefor, to which reference is to be had, &c., &c."

<sup>2</sup> Mr. Phillips says, 1 Ins. 54: "Verbal declarations may, by a provision in the policy, be made to form directly a part of the contract." The authority cited to sustain this broad doctrine is a *dictum* of Lord *Ellenborough* in *Robinson v. Tournay*, 3 Campb. 158, 1 M. & S. 217. The policy was on goods "thereafter to be declared"; the broker made, *in writing*, a declaration upon goods by a wrong ship, which he procured to be signed in initials by the defendant and other underwriters. But it being found that the declaration as made rested in mistake as to the ship and the unauthorized act of the broker, the court held that he might afterwards, in compliance with the orders of the assured, declare upon

<sup>3</sup> See *Vandervoort v. Smith*, 2 Caines, 160, per *Thompson, J.*



or mistake<sup>1</sup> were alleged, or the subject-matter of the contract questioned.

No rule in respect to the admission of evidence was in former times more constantly referred to than Lord Bacon's rule respecting latent and patent ambiguities.<sup>2</sup> This rule briefly stated is, that evidence may be received to remove a latent ambiguity, but not a patent ambiguity. The meaning of the rule is, that if the mean-

goods by another ship, without the assent of the underwriters, and without a fresh stamp. The passage in the decision upon which the statement of Mr. Phillips is founded is as follows: "The contract between the parties is complete when the underwriters have signed the policy. The declaration of interest is the mere exercise of a power conferred upon the assured. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing." That this was not called for by the facts of the case is evident. 1 Arn. 53, adopts the same deduction as Phillips. But we know no case in which words spoken about the bargain, at any time or in any way, are regarded as an integral part of the policy, merely by a reference to them which does not amount to a repetition of them. It is obvious that such cases must be extremely rare.

<sup>1</sup> *Walworth, Ch.*, in *Dow v. Whetten*, 8 Wend. 160.

<sup>2</sup> The term "latent ambiguity" is used very loosely to mean any doubt or uncertainty raised by extrinsic evidence, and very frequently there is a failure to distinguish between cases where a description is equally applicable to one of two or more persons, or of two or more things, and the other cases in which a doubt is raised by extrinsic facts, such as cases of defective and inaccurate description. This distinction is of great consequence, especially in reference to the kind of evidence ad-

missible to remove the doubt or uncertainty, for it is only in the case of the double application of words of description that evidence of *intention direct* is admissible to remove the uncertainty. It may be shown which of two or more persons or things was *intended* by a description equally applicable to all. *Altham's case*, 8 Rep. 155 a; *Doe v. Morgan*, 1 Crompt. & M. 235; *Doe v. Allen*, 12 Ad. & E. 451. Much will be gained in point of accuracy, it is conceived, by restricting the term "latent ambiguity" to the case where words of description have a double application. Indeed, it is so restricted by *Anderson, B.*, in *Smith v. Jeffryes*, 15 M. & W. 561. If the term is so restricted, we then have the cases of latent ambiguities proper, in which alone evidence of intention direct is admissible. All other uncertainties, whether patent or latent, in the ordinary sense of those terms, must be removed by the same kind of evidence, namely, by placing the court which is to construe an instrument as nearly as possible in the situation of the author of, or parties to, such instrument. The rule of patent and latent ambiguities cannot, we think, be regarded as furnishing a decisive test by which to determine in all cases whether evidence may be admitted to explain a written instrument. 2 Pars. Cont. (5th ed.) 557, n. (e). See also the very able treatment of this question in 1 Greenleaf's Ev. 359 - 362.

ing of an instrument upon its face be clear and unquestionable, no evidence is receivable to affect this meaning; but if evidence offered creates an uncertainty as to its meaning or application, then further evidence may be received to remove this uncertainty. The common illustration given of this rule is, that if a legacy be given to a person by name and description, and evidence shows that there are two persons to whom the name and description apply equally well, further evidence may be used to show which of the two persons was intended by the testator; but if the legacy in its terms is uncertain, it is void for uncertainty, and cannot be helped by evidence.<sup>1</sup>

There is undoubtedly some reason for this rule, and as far as this reason goes it may be useful; but the rule itself, though sometimes mentioned in recent cases, is referred to less frequently than formerly. The rule which we consider as the most reasonable and the most useful is simply this, that evidence from without may be received to explain a written instrument, but not to vary it.<sup>2</sup> It may be often difficult to draw the line distinctly

<sup>1</sup> Thus a devise to this effect, "I request a handsome gratuity to be given to each of my executors," is void for uncertainty. *Jubber v. Jubber*, 9 Sim. 503. So a devise to the "best men of the White Towers." *Year-Book* (49th ed.), 3, cited in *Winter v. Perratt*, 9 Clark & Fin. 688. So a bequest of a legacy to be distributed "among the real distressed private poor of Talbot County," there being no discretion given to the executors. *Trippe v. Frazier*, 4 Harris & J. 446. The same would be true of a bequest, "to be applied towards feeding, clothing," &c., the poor children of C. County, which attend the poor or charity school established at H. in said county. *Dashiell v. Attorney-General*, 6 Harris & J. 1. See also *Dashiell v. Attorney-General*, 5 Harris & J. 392; *Weatherhead's lessee v. Baskerville*, 11 How. 329. In such cases as this it is clear upon the face of the instrument that the intent is so uncer-

tain that no evidence of extrinsic facts can make it sufficiently certain. 2 Pars. Cont. (5th ed.) 558, n. (e).

<sup>2</sup> See *supra*, p. 112, n. 1; 2 Pars. Cont. (5th ed.) 557, n. (e), 562. The language of the court in *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. 175, is in accordance with this view: "The true meaning of the rule excluding parol evidence is, that such evidence shall never be used to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words they have used, upon any construction, will admit or convey." Mr. Greenleaf seems to take exceptions to this form of expression as inaccurate. "It is only in this mode," says he, "that parol evidence is admissible (as is sometimes, but not very accurately said) to explain written instruments, namely, by showing the situation of the party in all his relations to persons and

here. Often, it may be argued, that evidence offered can explain only by varying the meaning of the instrument. But this difficulty of application and definition exists equally with many rules of the law; and this rule itself we believe to be just and practically useful.

#### SECTION VII. — *Of the Slip or written Application.*

IN the Massachusetts case just referred to,<sup>1</sup> it is said that all proposals made, or conversations had, prior to the subscription of the policy are considered as waived if not inserted in the policy or contained in a memorandum annexed to it, but it is very common in England as well as in this country for persons wishing insurance to offer to the insurers what is called a slip or application for insurance. And the cases we have already cited show that the question has frequently arisen whether this paper is admissible in evidence to show the intention of the parties. In the year 1800 it was decided in Pennsylvania that the policy of insurance may be not only explained but controlled by the written order for insurance.<sup>2</sup>

things around him, or, as elsewhere expressed, by proof of the surrounding circumstances." 1 Greenl. Ev. 340, § 288. But the learned author's objection is not stated at length, nor does he suggest any more appropriate language.

<sup>1</sup> *Higginson v. Dall*, 13 Mass. 96. In this case it was held that a written memorandum, which was delivered to the insurance broker by the agent of the insured, but not inserted in the policy or annexed to it, was not admissible in evidence. See *supra*, p. 111, n. 1. See also authorities cited *supra*, p. 108, n. 2. But where the assured in a fire policy, in his application for insurance, stated the mode of conducting business and precautions taken to guard against fire in the building to which the policy related, it was held, that he was bound to a substantial compliance with the statement; whereby the

statement was, in effect, construed to be an implied condition or promise, relative to the risk during its continuance. *Houghton v. Manufact. Mut. F. Ins. Co.*, 8 Met. 114. This, however, would seem to fall more properly under the head of Representations.

<sup>2</sup> The case of *Norris v. Ins. Co. of America*, 3 Yeates, 84, from the report seems to have been decided entirely on equitable grounds. *Shippen*, C. J., in delivering the charge, says: "The memorandum shows the intention of the plaintiffs to have been, to insure the articles on board at the time of the receipt of their last intelligence, however injudicious the measure might have been. This will control and explain the expressions in the formal policy, and the mistake of the clerk therein shall be rectified thereby."

But in 1831 it was decided in New York by the Court of Errors, confirming the judgment of the Supreme Court, that the slip or application for insurance is inadmissible in evidence to show the intention of the parties in an action at law; that in such an action it is proper evidence only to show a misrepresentation, while in equity it may be used to correct the policy.<sup>1</sup> It should perhaps be remarked that in the beginning of this century courts of law in Pennsylvania not unfrequently exercised what would seem to be equity powers, and in the case referred to on the last page, the authority by which they sustain their ruling, is an English equity case. That a court of equity would have adequate power to rescind the policy if it did not conform to the actual agreement, or reform it into conformity with the agreement, we shall presently show. In an action at law on a policy before Mr. Justice Washington, that eminent judge took into consideration, in an inquiry as to the construction of the policy, the order for the insurance, and certain letters of the insured on which the order was founded, which letters were exhibited to the company.<sup>2</sup>

<sup>1</sup> In *Dow v. Whetten*, 8 Wend. 160, the court relying on *Pawson v. Bornvelt*, Doug. R. 12, n. 4; *Higginson v. Dall*, 13 Mass. 96; and *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, 278, say: "The memorandum or slip offered in evidence by the plaintiff for the purpose of showing the intention of the parties to the policy was properly rejected. The policy itself is the only legal evidence of the agreement between the parties. If that is not in fact filled up according to the intention of the parties, through inadvertence or mistake, a court of equity may, upon clear and positive evidence of such inadvertence or mistake, correct the policy. In such a case the slip may be used in the court of equity in connection with the evidence, for the purpose of showing the mistake and reforming the policy; but in a court of law it can be used for no other purpose than that of showing a misrepresentation on the part of the assured."

<sup>2</sup> *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419. "We are then," say the court on this point, "to consider whether the order for insurance can be resorted to for the purpose of giving a construction to this policy. Now, I take the rule to be, that if by mistake a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the agreement. If the deed be ambiguously expressed, so that it is difficult to give it a construction, the agreement may be referred to in order to explain such ambiguity. But if the deed be so expressed that a reasonable construction may be given to it, and, when so given, it does not plainly appear to be at variance with the agreement of the parties, the latter is not to be regarded in the construction of the former."

It should, however, be noticed that in this case,\*although it was a suit at law, the counsel had agreed that the court should have the same power, and give the same relief to the defendants, as if sitting in equity upon a bill to amend the policy.

We repeat, that it is quite certain that if negotiations had been going on with a view to a contract, and that contract is finally expressed by the parties in writing, the written contract cannot be controlled by the precedent negotiations, whether they were oral or written.<sup>1</sup> It follows that if this slip is to be considered only as a part of that negotiation, it cannot be used to affect the policy. But it may be said that it is more than this, and perhaps much more. It is a definite proposition or offer; and, when it is accepted, it becomes the basis of the policy. If ambiguities in the policy justify the reception of evidence to explain them, there would seem to be no evidence so pertinent and direct as the slip.<sup>2</sup> If, on the other hand, the terms of the policy are entirely unambiguous, but are in contradiction to those of the slip, and, in an action on the policy, whether in law or equity, a mistake were alleged, we apprehend this contradiction would be receivable and material evidence to prove the mistake.<sup>3</sup>

<sup>1</sup> See *Higginson v. Dall*, 13 Mass. 99; *Ewer v. Washington Ins. Co.*, 16 Pick. 502; *New York Gas-Light Co. v. Mechanics' Fire Ins. Co. of New York*, 2 Hall, 108; *Dow v. Whetten*, 8 Wend. 166. Per *Story, J.*, in *Van Ness v. City of Washington & United States*, 4 Peters, 286. See also previous notes. The very circumstance that the final instrument differs from the preliminary contract affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was intended to be in pursuance of the original contract.

It is upon a similar ground that courts of equity as well as courts of law act, in holding that, where there is a written contract, all antecedent propositions, negotiations, and parol interlocutions on the same subject are to be deemed

merged in such contract. 1 *Story, Eq.* § 160, p. 140.

<sup>2</sup> In *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 279, it is said: "In policies of insurance, the label or written memorandum from which the policy was filled up is always considered of great importance in determining the nature of the risk and the intention of the parties." So in *Motteux v. London Ass. Co.*, 1 Atkyns, 545, Lord *Hardwicke* held, that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case, the label was treated as the real contract between the parties. See the language of the court in *Dow v. Whetten*, 8 Wend. 168, cited *supra*, p. 115, n. 1; *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419; *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 4; 1 *Duer, Ins.* 72.

<sup>3</sup> In *Motteux v. London Ass. Co.*, 1 Atk. 545, Lord *Hardwicke* said: "Now

If the slip or proposition be entered in the proper book of the insurers, marked accepted, and signed in whatever may be the customary manner of those insurers, we have already said that it was itself a bargain which binds the insured as to his premium, and causes him to be in fact insured upon such terms as are usually expressed in the common policies of the insurers, although it is not a policy, but an agreement for a policy.<sup>1</sup> The insured

the *label* is a memorandum of the agreement, in which the material parts of the policy are inserted, — the master's, the ship's name, the premium, and the voyage. . . . It is pretty difficult to reconcile the first part of the policy and the latter; but *the label* makes it very clear, for that considers the voyage and the risk as the same; and therefore it was only the mistake of the clerk which ought to be rectified agreeable to *the label*." 4 Vin. Abr. 281, pl. 10; *Ewer v. Washington Ins. Co.*, 16 Pick. 502; *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419. See this case cited at length, p. 115, n. 2. *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 4. *Washington, J.*, in this case says: "Where the terms of the order are departed from by consent, no person will contend that the order should control the policy; but if by fraud or mistake, then the order may be resorted to where it *materially* varies from the policy, because in reality that would be the only true evidence of the agreement upon the point of variance. . . . So if it contain a warranty which is not authorized by the order, and the like; and in such cases the variance itself between the two instruments would, without contradictory proof, be evidence of the mistake." *Franklin Fire Ins. Co. v. Hewitt, Allison, & Co.*, 3 B. Monr. 231; *Dow v. Whetten*, 8 Wend. 160.

<sup>1</sup> We have considered one aspect of this question already, *supra*, pp. 34 to 43, when treating of oral insurance.

To what we then said we add a case which occurred in Pennsylvania, where the insurers were held liable upon an oral promise. The premium had been paid for a fire policy, and notice given to the applicant that, on certain preliminaries being complied with, a policy would be issued. The compliance with the requirements was notified to the insurance company, and a request made that they would examine the premises and issue the policy, which they neglected to do. Held, that this was an agreement for insurance on which the company was liable. *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339. Here there was no memorandum signed by the party held bound. But it is a material circumstance in the case, that the premium had been paid, and everything requisite on the part of the applicant had been done. If, then, the company's clerk, who conducted the transaction on their part, was fully authorized to bind them, or the communication made by him to the applicant had been approved by the officers authorized to bind the company, the whole transaction assumes the aspect of an implied conclusive admission, on the part of the company, of the due execution and constructive delivery of the policy which they held subject to the applicant's order, as is sometimes done. Ordinarily, an instrument in writing to be effectual, is expected to be delivered to the obligee therein. But in reference to parol agreements, — and policies



may demand a policy so framed ; and, if it be refused, the insurers would still be bound, unless the refusal be justified by the peculiar circumstances of the case. But if a policy is made out, given, and received, there are not two bargains between the parties ; but the first informal bargain is superseded by the later and formal bargain. And thereafter the first bargain, or the slip or applica-

are seldom under seal, — the parties may agree that the instrument, though remaining in the hands of the one party or the other, without any formal delivery of it by either to the other, shall be evidence of their agreement. *Loring v. Proctor*, 26 Maine, 18. So also in Ohio it was held that a memorandum that a subject "is insured," or "shall stand insured," means that it is insured, or shall be so, according to the ordinary form of policy used in the office where the memorandum is made. Negotiations were had for the insurance of a shipment of corn, and the secretary of the company wrote to the applicant that the company did not understand how he made the value so much as he proposed to get insured, and that they could not deviate from their rule to take the "market-price and five per cent," adding : "It may stand insured until Monday, when we shall see you." And the loss occurring on Sunday, the company were held liable on this as an insurance. *Neville v. M. & M. Mut. Ins. Co.*, 17 Ohio, 192. And such an agreement for insurance remains in force, and is not discharged, until such a policy as is agreed for is made out, or the claim for it is waived. *Franklin Ins. Co. v. Hewitt et al.*, 3 B. Monr. 239.

In New York, as in most States, the application for insurance is made in writing. But there the insurance offices keep a blank form of a memorandum of an agreement for insurance, which is filled up and signed by both parties.

The premium note is not given until the delivery of the policy.

In a case in Louisiana, an application for re-insurance on a policy, with the indorsement, "Taken at three per cent premium," duly signed, was held to be an agreement to re-insure against the risks taken in the original policy, and the insurers were held to be as liable as they would be upon a formal policy. The court, by *Slidell, J.*, saying : "This was a loose way of doing business. But the company cannot be permitted to derive any benefit from that looseness. As they chose to make a contract in this way, we must hold them bound as fully as though they had executed a formal policy of re-insurance." *Woodruff v. Columbus Ins. Co.*, 5 La. Annual, 697.

At Marseilles, instead of a slip signed by the insurer, the broker made out a note containing an abstract of the risk and terms, and the underwriter subscribed the policy in blank, leaving it to be filled up by the broker according to the note. 1 Emer. c. 2, § 4. But this note constituted no part of the contract, nor could it be used to correct any mistake in the policy, because signing policies in blank is contrary to the French ordinance, and is disapproved of by Emerigon as exposing insurers to frauds, since they often found that the policy did not correspond to the broker's note. There is such a requirement for policies to be in writing in some other countries, but we have no such provision of law in the United States.



tion, can only affect the policy when it can be received as evidence respecting it; but then it would have great weight.<sup>1</sup> And in some parts of this country the practice exists, especially in fire insurance, of requiring that the proposal be made in a certain form which is furnished by the insurers, and a reference may be had to the proposal to explain the terms of the policy. And the application is sometimes declared to be a part of the contract.<sup>2</sup>

### SECTION VIII. — *Of other Writings.*

A QUESTION in some degree analogous to this arises when either party attempts to connect with the terms of the policy, and read as a part of it, some other writing. This other writing may be either an addition to the policy or an alteration of it. In one sense it is always an alteration. It may, however, be merely an addition, or it may be a substitution of new terms for those which the body of the policy contains. And we have already seen that a paper can be received for this purpose only when it is so referred to in the policy itself as to be made in fact a part of it. And then it ceases, of course, to be distinct from and independent of the policy.

It is quite certain that any stipulations or conditions or agreements or acts which are implied by the legal construction of the policy or of any papers connected with it, are as much parts of the policy, or of such papers, as if they were written out at length.<sup>3</sup>

<sup>1</sup> See authorities, *supra*, p. 116, n. 3. Emerigon, citing Valin, says that, should the assured refuse to pay, the original memorandum of the broker, or an extract from his books, would be sufficient evidence to enable the insurer to recover. 1 Emer. c. 2, § 4, p. 48.

<sup>2</sup> Thus, in *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray, 384, the policy provided on its face, that "said application shall form part of the contract to be taken in connection with the policy."

<sup>3</sup> "I take the rule to be, that a writing contains all that may fairly be implied from it." *Bronson, J.*, in *Potter v. Ontario & Livingston Mut. Ins. Co.*,

5 Hill, 147. It was made a condition of a fire policy, that if the assured should make any other insurance on the same property, and should not diligently give notice to the company, and have the same indorsed on the policy, *or otherwise acknowledged and approved by them in writing*, the policy should cease to be of effect. The assured effected further insurance, and gave notice, to which he received this reply from the secretary: "I have received your notice of additional insurance." Held, that this was both acknowledgment and approval in writing under the required condition.

If, therefore, the additions have no other effect than that which the law would have, they are only surplusage. Where, however, they vary these conditions or stipulations, the question arises whether they can be read as a part of the policy. They may be written on the face of the policy, or in the margin.<sup>1</sup> In any case, there is no doubt that if they are referred to in the body of the instrument in such a way as to identify them, they would be read as a part of the instrument. And it would seem as matter of practice, and of law also, that when printed on the margin, or written there when the policy is made, they form a part of it, although not referred to.<sup>2</sup> If they are indorsed on the policy,

So, there are certain terms and conditions implicitly contained in every policy, which, though not expressly inserted on the face of the instrument, are of exactly the same binding authority as though they were. . . . They are, in fact, the terms upon which the parties mutually understand their contract to be based, which it would be needless to express. *Noble v. Kennoway*, Doug. 510; *Relly v. Royal Exch. Ins. Co.*, 1 Burr. 341. Of such a character is the implied condition that the assured, at the time of procuring the policy, shall truly disclose to the underwriters every material risk exclusively within his own knowledge, and not embraced by some condition in the policy. Again, the implied condition attaches to every policy as a warranty that the vessel is sea-worthy, thoroughly equipped, and in every way fit for the service on which it is employed; and though this is never expressed in the policy, it is uniformly implied as a part of the contract. See *post*, chapter on Implied Warranties.

So, also, the usage governing the course of the voyage, as we have seen, becomes a part of the contract, and is supposed to be incorporated in every policy, and forms as much a part of its legal effect as though it were set out in

terms on the face of the policy. See authorities, p. 91, n. 1, *supra*. Another implied condition is the one termed a condition not to deviate; that the ship shall pursue the voyage from one terminus to the other without delay or deviation. Any failure to comply with it exempts the underwriter from all liability from the moment of deviation. See *post*, chapter on Deviation.

<sup>1</sup> *Dennis v. Ludlow*, 2 Caines, 111. In *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488, where the words "gunpowder is not insurable, unless by special agreement," were inserted in the proposals annexed to a policy of insurance, at the foot of a clause headed "extra hazardous," in an enumeration of goods considered not hazardous, and of goods, trades, and occupations considered hazardous and extra hazardous, it was held that gunpowder must be considered as included in articles enumerated as extra hazardous, the court saying: "The proposals and conditions attached to the policy form part of the contract, and have the same force and effect as if contained in the body of the policy." *Guerlain v. Col. Ins. Co.*, 7 Johns. 527; *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. 673, 7 Wend. 270. See also *Cochran v. Retberg*, 3 Esp. 121.

<sup>2</sup> In *De Hahn v. Hartley*, 1 T. R.

there may be more question. We should say, however, that, wherever written, but more especially if written on the back, they would not constitute a part of the policy, if not referred to in the policy, unless they were verified by subscription, or proved to have been written before the policy was delivered.<sup>1</sup> So it would be if the writing were on a separate paper, and this was distinctly referred to. By this we mean, not merely mentioned, but spoken of in such a way as to show that the parties expected to be bound by it as much as if it were in the body of the policy.<sup>2</sup> And the same rule

343, for instance, the words "sailed from Liverpool with fourteen 6-pounders, &c., copper-sheathed," were held to be part of the policy and to operate as a warranty. So, in *Kenyon v. Berthon*, Doug. 12, n. 4, where the words were written transversely. See also *Bean v. Stupart*, Doug. 11; *Ewer v. Washington Ins. Co.*, 16 Pick. 502. Mr. Duer seems to think it immaterial whether the written words of a policy are inserted in the body of the instrument, or written on its face, or in the margin, and that if they be only written before the execution of the policy, or by mutual consent after execution and before commencement of the risks, they form essential parts of the contract. There would seem to be much reason for this, and the common practice would sustain it. But of the authorities cited by him, a part only support such a proposition. 1 Duer, Ins. 75.

In France, all that is written must be inserted in the body of the policy; and not only this, but if any blank is left which might be filled up by the assured, the policy is void. This avoids the danger of fraud. Boulay Paty, however, (3 B. P. 266) says it is only when it affects the essence of a contract by leaving the sense imperfect, or where a new provision has been fraudulently inserted. A just compliment is paid by

Mr. Duer to the honesty of the assured in general, from the fact that frauds of this character have not appeared in a single instance. 1 Duer, Ins. 76.

<sup>1</sup> *Harris v. Eagle Fire Co. of New York*, 5 Johns. 368; *Warwich v. Scott*, 4 Campb. 62. In *Emerson v. Murray*, 4 N. H. 171, it is said that an indorsement cannot be considered a parcel of the deed, until it is shown affirmatively to have been upon the instrument when executed.

<sup>2</sup> *Worsley v. Wood*, 6 T. R. 710. And it would seem to make no difference that the conditions referred to are without stamp, seal, or signature, if the policy itself has all the law requires. *Routledge v. Burrell*, 1 H. Bl. 254. In these cases the condition was that, on the happening of a loss, the insured should procure a certificate of his character, and that the loss happened without fraud. The words of reference were in both instances "according to the tenor of the printed proposals delivered with the policy." In *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488, the "conditions and proposals" referred to were certain lists of hazards excepted. *Wood v. Worsley*, 2 H. Bl. 574; *Tarelton v. Staniforth*, 5 T. R. 695, 1 B. & P. 471. The rules and regulations of an insurance company are frequently so referred to in marine and fire policies, more especially those of mu-

has been applied when the addition was printed on the same sheet with the policy, although it was not referred to.<sup>1</sup>

tual-insurance companies. Where the application for insurance is thus referred to, it forms a part of the policy. *Clark v. Manuf. Ins. Co.*, 8 How. 235; *Murdock v. Chenango Co. Mutual Ins. Co.*, 2 Comst. 210; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Stewart v. Wilson*, 12 M. & W. 11. In this case the reference was to a rule of a mutual marine insurance company, making a condition for repairs and outfits that might be prescribed by a committee of the company. *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122; *Maryland Ins. Co. v. Bossiere*, 9 Gill & Johns. 121. The effect of such reference must, however, depend on the manner and object of making it. *Burritt v. Saratoga Mut. F. Ins. Co.*, 5 Hill, 188. The stipulations in policies are considered express warranties, in which the assured stipulates that certain facts relating to the risk are or shall be true, or have been or shall be done. And it is not requisite that the circumstance or act warranted should be material to the risk, in which respect an express warranty is distinguished from a representation. *Duncan v. Sun Fire Ins. Co.*, *supra*, and citing *Lord Eldon*. But a mere naked reference in a policy

to the written application for insurance will not make the latter a part of the contract so as to change what would else be a representation into a warranty. *Bronson, J.*, in *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, *supra*; *Stebbins v. Globe Ins. Co.*, 2 Hall, 632. Otherwise, where the policy refers to the application, thus: "reference being had to the application, &c., for a more particular description, and as forming part of this policy." *Id.*; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. 285; *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. 280. But see, *contra*, *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Monr. 634. And see *Williams v. New England Mut. F. Ins. Co.*, 31 Maine, 219, that a reference only made in the policy to the application will not be sufficient to make it a part of the contract; but a clause declaring that the application forms a part of the policy makes it a part of the contract. And to the same effect is *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72. This case uses the same distinction adopted in the case in Maine, that a representation is a part of the preliminary proceedings, preceding and proposing a contract, and a warranty is a part of the contract com-

<sup>1</sup> *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210; *Roberts v. Chenango Co. Mut. Ins. Co.*, 3 Hill, 501. In each of these cases the policy was on one half of an entire sheet, and on the other half there was a printed statement, headed "Conditions of Insurance." No reference was made to it in the body of the policy. Held, that it formed part of it. *Desilver v. State Ins. Co.*, 38 Penn. St. 130. In *Duncan v. Sun F. Ins. Co.*, 6 Wend. 488, the paper

was both annexed and referred to in the policy. But in such a case, though the juxtaposition of the papers is sufficient evidence *prima facie*, yet the presumption that they were intended to be taken together may be rebutted by parol evidence, as by showing that the two were thus connected by mistake. *Roberts v. Chenango Co. Mut. Ins. Co.*, *supra*. See also *Desilver v. State Mut. Ins. Co.*, 38 Penn. St. 130.

But if it be on a separate paper, and not referred to in the policy, it cannot be made a part of it. And this has been held where the paper was attached to the policy by a wafer.<sup>1</sup>

pleted. Ordinarily, therefore, a statement made in an application for insurance is a representation only; but it may be incorporated into the policy, and thereby become a part of the contract. And as, when thus made a part of the contract, what would otherwise have been a representation becomes a warranty, the reference incorporating it must be in the policy itself. "No case," say the court, "has been referred to in which this rule has been relaxed, except in relation to the printed proposals of the underwriters accompanying and always attached to the policy." And the language of Lord *Mansfield*, in *Pawson v. Watson*, Cowp. 785, is cited, that in his opinion, to make written instructions valid and binding as a warranty, they must be inserted (not referred to) in the policy. *Snyder v. Farmers' Ins. & Loan Co.*, 13 Wend. 92, S. C. 16 Wend. 481; *De Longuemere v. Tradesmen's Ins. Co.*, 2 Hall, 608, commenting on the cases *supra*, requiring certificates. Simply referring, then, to other written or printed documents would not seem, from the adjudged cases, to be enough to make the documents so referred to part of a policy. But it must be such a reference to them as is equivalent to an express declaration, that they are to be taken as a part of the policy itself.

<sup>1</sup> *Bize v. Fletcher*, Doug. 13, n. So held, also, where a written memorandum was folded up with the policy when it was brought to the underwriters to be signed. *Pawson v. Barnevelt*, Doug. 13, n., cited by the court in *De Longuemere v. Tradesmen's Ins. Co.*, 2 Hall, 609, to sustain the rule that, to give

such writings a controlling operation, they must be part of the contract and appear on the face of the policy. See both the above cases commented on in *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. 492. The court say: "It has been correctly held that a stipulation, or clause, or memorandum, . . . although written in the margin, on the back, or on any other part of the same paper, if made before or at the time of the underwriting of the policy, and intended as a part thereof, is considered as a part of the contract itself, in the same manner as if it had been inserted in its proper place in the form of a stipulation or agreement in the body of the policy." This, in the opinion of the court, accounts for the different decisions of Lord *Mansfield* in the cases of *Beau v. Stupart*, 1 Doug. 11, and *Kenyon v. Berthron*, Id. in notes, in both of which he held stipulations written upon the policy itself as strict warranties, and in the cases above cited, referred to also in Doug.: "It is perfectly competent, I have no doubt, for the underwriter, by the insertion of a stipulation to that effect in the policy itself, to give to a statement of facts contained in a separate paper or instrument, sufficiently referred to and identified, all the effect of an express warranty inserted in the body of the policy. . . . But the cases referred to show that the principle of converting everything contained in a policy into an express warranty, although there is nothing in the form of the memorandum itself to show that such was the intention of the parties to the contract, which belongs to marine policies, is not to be ex-

It will be seen from our notes that the cases on this subject are numerous, and the law as derived by them not always certain. We apprehend, however, that the principle which runs through these cases is this, that nothing should be taken as a part of the policy itself which is not either so written or so referred to in the policy as to show that it was not added after the policy was made, and that it was regarded by the parties as a substantial part of their contract:

So far as relates to the admission of the slip or application to control or affect the policy, the conclusion from the cases would be that, if the policy distinctly refers to the application, this reference makes it a part of the policy;<sup>1</sup> but there are cases of weight

tended to any memorandum or paper writing not contained in the policy itself, or written upon the same paper with the policy so as to be considered as contained therein." It seems that, in respect of construing every matter of mere description contained in the body of the policy, although not material to the risk, into an express warranty which is to be literally complied with, there is a difference between marine and fire policies. The reason for this is, that in making marine policies the insurer is in general wholly dependent upon the statements of the insured with regard to the property and the risk; whereas in fire policies the misdescription is most generally the mistake of the underwriter's own surveyor. In *Roberts v. Chenango Co. Mut. Ins. Co.*, the court remark on the case of *Bize v. Fletcher* thus: "It would be impossible to sustain the decision in that case, if the slip wafered to the policy had expressly declared itself to be conditions of insurance." 3 Hill, 503.

<sup>1</sup> *Clark v. Manuf. Ins. Co.*, 8 How. 235; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Kennedy v. St. Lawrence Co. Mut.*

*Ins. Co.*, 10 Barb. 285; *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. 634; *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. 280. In *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235, the reference was in these words: "Reference is had to survey No. 88, on file in the office of the Protection Insurance Company." The survey consisted of answers given by the insured to questions proposed by the insurers. Held, that this reference was not merely for a fuller description and identification of the premises to be insured, but served to incorporate all the survey into the policy. *Ellsworth, J.*, said: "All the survey, as much as any part of it, is incorporated into the policy, and constitutes the conditions of plaintiff's contract; and hence every part applicable to the subject-matter is to be regarded as obligatory on the insured, whether the survey is to hold a warranty, as in the policy, or a representation material to the risk, to be substantially kept and performed, which latter is the character we are inclined to give it. We know no reason why a writing intended to be a part of a contract may not be held to be incorporated into it by a proper reference as well as by an extended re-



which hold that the reference must be such as to amount to an express adoption of this application.<sup>1</sup> Our notes will show, however, that there has been a diversity of decision on this point. This conclusion is still more certain and unquestionable where the policy expressly declares that the stipulation is to be taken as a part of the policy; and in practice it is not uncommon to declare in the policy that the slip or application is a part of it.<sup>2</sup>

### SECTION IX. — *Meaning of Words.*

IN every written contract the words used are to be understood in their common and popular sense. There may always be cases where either the context or subject-matter shows that they were

cital. The reference in this case, in our judgment, is of such a character. It was made, we think, to show what then were and should continue to be the stipulations of the plaintiffs touching the property insured."

<sup>1</sup> *Williams v. New England Mut. F. Ins. Co.*, 31 Maine, 219; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers' Ins. & Loan Co.*, 13 Wend. 92, S. C. 16 Wend. 481; *De Longuemere v. Tradesmen's Ins. Co.*, 2 Hall, 608; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *Hall v. Peoples' Mut. F. Ins. Co.*, 6 Gray, 185. See *supra*, p. 121, n. 2. *Wall v. Howard Ins. Co.*, 14 Barb. 383. In *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122, the policy, after specifying the amount insured, proceeded thus: "Reference being had to the application of the said J. and T., T. [the insured] for a more particular description and the conditions annexed, as forming a part of the policy." The court held that the language did not constitute the application a part of the policy, but only the conditions annexed. *Beardsley, J.*, said: "The conditions are thus undoubtedly made a part of the con-

tract of insurance, as much as if embodied in the policy. But it is otherwise with the application. That, as it seems to me, is referred to for the mere purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof."

<sup>2</sup> That when the policy contains a clause declaring that the application forms a part of the policy it thereby becomes a part of the contract, and its statements are thereby changed from representations into warranties, see *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188; *Wall v. Howard Ins. Co.*, 14 Barb. 383; *Allen v. Charlestown Mut. F. Ins. Co.*, 5 Gray, 384. And in *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, the policy of insurance referred to the application by its number for a more particular description of the goods insured, and treated it "as forming a part of the policy." The court say: "This form of expression has been repeatedly held to constitute a warranty, as much so as if the application were incorporated in the policy, and formed a component part of it."



used in a peculiar sense, differing from the ordinary sense ; and then, of course, this sense is to be adopted as that of the parties to the contract.<sup>1</sup> And we have already seen that a mercantile usage,

<sup>1</sup> And this meaning is sometimes presumed to be known to the courts. There is no occasion, therefore, for evidence of such meaning. 2 Pars. Cont. (5th ed.) 501, and note (1). *Palmer v. Warren Ins. Co.*, 1 Story, 365. "The best construction," says *Gibson, C. J.*, "is that which is made by viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." *Schuylkill Nav. Co. v. Moore*, 2 Whart. 491 ; *Houghton v. Gilbert*, 7 Car. & P. 701. "Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate non grammatica sed populari ex usa." *Grotius* (De Jur. B. & P., Lib. II. c. 16). On this passage Mr. Duer remarks (1 Ins. 215, n. III.), that *Grotius* constantly uses the word "conjectura" as denoting the collection of the intent, by other means than the sole explanation of words. So that his meaning here is, that words are to be understood in their ordinary and popular sense, unless the intent to use them in a different sense is otherwise manifest. What Lord *Ellenborough*, in *Robertson v. French*, 4 East, 135, says with regard to the construction of the policy of insurance is a full and clear statement of the law on this point, namely, that it must be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to

the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The first proposition of Mr. *Wigram*, in his treatise upon the admission of extrinsic evidence in aid of the interpretation of wills is, that, "a testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the substance of the will it appears that he used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." This, however, if true in regard to wills, is not so as to policies of insurance, unless by strict and primary meaning is meant ordinary meaning. The object of interpretation and construction is to find the intention of the parties, and it is obvious that that intention is best sought by affixing to the words of an instrument such meanings as are common or ordinary. Where, however, the law has defined the meaning of words, they must be understood to be used in the sense which the law attaches to them, unless the context or the circumstances of the case indicate that another meaning is the one in which they are there used. In *Howe v. Mutual Safety Ins. Co.*, 1 Sandf. 151, the court say: "In fine, we believe the rule of construction applicable to policies of insurance does

such that the parties must be presumed to have had it in mind in making the contract, is allowed great weight in the construction of policies of insurance. And if we add that it has sometimes been resorted to quite too readily, we are not without high authority for this suggestion. At the same time, this resort to usage is often necessary and just, and it is perhaps enough to say that its liability to abuse calls for caution.<sup>1</sup> If it be a general rule that the meaning of the words of a contract is not to be sought in their etymology, or in any nice inquiry into their origin or definition, but that common use gives us their true meaning, this must be especially true in construing policies of insurance; for the whole instrument and all its more special provisions are drawn, generally, at least, and not only in the beginning of the business of insurance but at the present time, by merchants without the aid of professional advice or dictionary definition; and they must be understood to have used the words in the way that others use them in similar business. Of words which are strictly technical words we have already treated.

It has been remarked by high authority that there may be cases where the words used may have two entirely distinct meanings.<sup>2</sup>

not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification, unless such terms have by the known usage of trade, in respect to the subject-matter, acquired a meaning distinct from the popular sense of the same terms, or unless the instrument itself taken together shows that they were understood in some peculiar manner; and that while we may not enlarge or restrict the clear and explicit language of the contract, by proof of a custom or usage, yet in the application of the contract to its subject-matter, in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within and what were excluded from its operation. Such evidence is proper on the same principle

that proof of the meaning of technical words, and words of science and the arts, is permitted in arriving at the intention of the parties in the construction of contracts." See also cases cited *supra*, pp. 71-81.

<sup>1</sup> *Rogers v. Mechanics' Ins. Co.*, 1 Story, 608; *Howe v. Mut. Safety Ins. Co.*, 1 Sandf. 152.

<sup>2</sup> *Peisch v. Dickson*, 1 Mason, 10. Mr. Justice Story, in speaking of the difficulty of the application of the rule about latent and patent ambiguities, to particular cases, where the shades of distinction are very nice, says that there seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and that is where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter

As, for example, the word "freight," which in common use means sometimes the goods which are carried, and sometimes the money paid for the carriage by the owner of the goods. If it means the first, the interest in the freight belongs to the owner of the goods; if it means the second, it belongs to the owner of the ship to whom the earnings belong. If there be an uncertainty as to which of these meanings this word bears in the instrument under consideration, parol evidence may be received to determine this meaning.

So, too, if the words are in themselves indeterminate, as if such phrases be used (which we shall presently have to consider in another connection) as "for whom it may concern," "at and

in the contemplation of the parties. And in such case he thinks that parol evidence might be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred. As in the instance of the word "freight," to show in which sense the parties intended to use the term. *Birch v. Depeyster*, 4 Campb. 385, where the master of a ship was hired for a voyage to the East Indies by a written agreement, which stipulated that he should receive £120 "in lieu of privilege." The question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "privilege." Held, that what the parties said upon the subject before and at the time when the agreement was entered into was admissible in evidence. *Gibbs, C. J.*: "The case turns upon the meaning of the word 'privilege.' This is a mercantile term, and I must learn its meaning from mercantile men. Then, if indifferent witnesses may be called to explain what is understood by 'privilege,' may we not hear the construction put upon the word by the parties themselves before the agreement was entered into?"

*Keate v. Temple*, 1 Bos. & P. 158. The court will take into consideration not only the expressions used, but the particular situation of the defendant at the time of his undertaking. So, for instance, in *Carruthers v. Sheddon*, 6 Taunt. 13, where D. and W. being general partners under the firm of D. & Co., and D. & Co. taking a share with three others in a particular adventure, which D. & Co. manage and insure for the account of D. & Co., it is a latent ambiguity to be explained by evidence whether the D. & Co. for whose account the insurance is made means D. and W. only, or all who are partners of D. in that particular adventure. 1 Duer, Ins. 168 - 171. Nor is the evidence of extrinsic facts limited to the interpretation of particular words; it may equally be received where an entire clause or provision is indeterminate and ambiguous. *Preston v. Greenwood*, 4 Doug. 28; 2 Pars. Cont. 557 *et seq.*, and generally conversations between the parties at the time of making a contract are competent evidence, as part of the *res gestæ*, to show the sense which they attached to a particular term used in the contract. 1 Greenl. Ev. 331; *Gray v. Harper*, 1 Story, 574.

from," or the like, evidence may be received to determine the meaning.

It is a common rule in the interpretation of contracts that *and* may be read in the place of *or*, and *or* for *and*. In the same way, if the intention of the parties requires it the words "or either of them" may be added.<sup>1</sup> An inquiry is often made into the history of a clause in a policy, and the purpose for which it was introduced. But although this may afford some aid in arriving at its meaning, yet it cannot control the construction of its language.<sup>2</sup>

In none of these cases, however, can there be an uncertainty which calls for evidence from without, if the policy considered as a whole or in all its provisions cures this uncertainty, for the policy is the highest evidence of its own meaning, and not only should the whole policy be considered in construing every part, but every part should be so construed, so far as it can be without violence or unreasonableness as to give force and effect to the policy as a whole.<sup>3</sup>

<sup>1</sup> *Davis v. Boardman*, 12 Mass. 80. The owner of the ship and cargo in this case had given orders to have them insured in England, but fearing that his letter might not have arrived, he caused insurance to be effected in this country by a policy containing the following memorandum: "Should this vessel and cargo be insured in England in time to attach, this policy is to be cancelled." The vessel was insured in England, but not the cargo. The court held, that the insurer on the cargo here was liable, and the clause was construed to mean, "should this vessel and cargo, or either of them, be insured in England," &c. "It is not uncommon," say the court in the same case, "in papers written without much attention to technical and grammatical rules, to find *and* used for *or*, and *or* for *and*." *Rees v. Abbot*, Cowp. 832, was an action on a promissory note; the declaration stating that the defendant and another made their promissory note, by which they jointly *or* severally promised to

pay. Lord *Mansfield* said: "*Or*, in this case, is synonymous with *and*. They both promise that *they*, or *one* of them, shall pay. Then both and each is liable *in solidum*. The nature of the transaction forces this construction. It is said that judges should be astute in furtherance of right and the means of recovering it. And therefore one is ashamed to see either hitch or hang upon pins or particles, contrary to the true manifest meaning of the contract."

<sup>2</sup> See *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595; *Kettell v. Alliance Ins. Co.*, S. J. C., Mass., Nov. T. 1857; *Heebner v. Eagle Ins. Co.*, 20 Law Rep. 578.

<sup>3</sup> The various provisions of the policy must, therefore, be considered and compared, and a construction be adopted that shall give effect to each and consistency to the whole; and, to accomplish this, an obscure intent must yield to that which is clear, and a subordinate and particular to that which is the principal and general. "Ex ante-

It is also a general principle in the construction of instruments to remember their general purpose or the object of the parties in

cedentibus et consequentibus fit optima interpretatio." The reason for this rule is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and object in view in all of it, and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. As there could not have been any repugnancy in the actual intentions of the parties, and they could not have meant that their agreement should be contradictory and self-destructive, all seeming discrepancies that the examination of the whole instrument may discover, must, if possible, be reconciled. 2 Pars. Cont. (5th ed.) 501 *et seq.* n. (u). The grave words of Lord Coke relative to the proper construction of statutes are quite as applicable to the interpretation of contracts: "The good expositor makes every sentence have its operation; he gives effect to every word in the statute; he does not construe it so that any word should be vain and superfluous; nor yet makes exposition against express words for 'vipérina est expositio quæ corrodit viscera textus,' but so expounds it that one part of the act may agree with another, and all may stand together." 11 Rep. 34; *National F. Ins. Co. of Baltimore v. Crane*, 16 Md. 260. In the same way, in construing all written documents, and a policy of insurance no less than others, the construction of particular parts may be determined by the subject-matter of the writing.

Thus, where liberty was given to cruise for six weeks, Lord Mansfield ruled, merely in consideration of the subject-matter of the policy, that this

meant six consecutive weeks, without recurring to any testimony as to usage or common understanding of this language, as influencing the construction. *Syers v. Bridge*, Doug. 527. Lord Mansfield says: "The meaning of words depends upon the subject. The subject-matter is decisive to show, in my opinion, that the six weeks meant one continued period of time. A cruise is a well-known expression for a connected portion of time." See *Frichette v. State Mut. F. & M. Ins. Co.*, 3 Bosw. 190; *Grant v. Delacour*, 1 Taunt. 466. In this case there was a policy of insurance upon a new ship still on her ways, drawn in the usual form of a marine policy, describing the period of risk "while being safely launched," and "until she be moored twenty-four hours in safety," and describing the perils insured against by mentioning the usual perils named in a marine policy, and "all other sea-perils, losses, and misfortunes to the hurt, detriment, or damage of the vessel or any part thereof, except those arising from the negligence, fraud, ignorance, or misconduct of the master." In the process of launching, the vessel stopped on the ways, in a most critical and dangerous position; her stern floated, and she strained; and she was in imminent danger of becoming hogged. After sixteen days, by great exertions, she was preserved and floated in safety; and it was held that the insured was entitled to recover the actual expenses necessarily incurred in the preservation of the vessel, and in her deliverance from danger of being injured; and that the policy was to be construed with reference to the manifest design of the insurance, its special nature, and its expressed application

making the instrument. An application of this rule will sometimes call upon the court to consider the general purpose of all policies of insurance, which is to secure to the insured indemnity against actual loss, and no more than indemnity. This principle was much regarded in an important case in Massachusetts in determining the amount for which insurers are liable where the owners of the vessel insured were compelled to pay the owners of another vessel for damages caused by a collision with the vessel insured.<sup>1</sup>

SECTION X. — *As to the Time when the Policy goes into Effect.*

THE time when the policy of insurance goes into effect may be questioned.<sup>2</sup> Here the first evidence is the policy itself, if it bears

to a vessel while in the process of launching; *Woodruff, J.*, saying: "In giving a construction to the contract, we are bound to look at the object which the parties had in view, and to give effect to the terms employed, so far as they can be sensibly applied to such an insurance. . . . We think that it is our duty to give these terms and these policies an application and a signification appropriate to the manifest design of the insurance, and that the vessel was, therefore, covered by the policies from the moment the launching commenced."

<sup>1</sup> *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477, 490. In *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, insurance was effected on a vessel in three different offices. A loss having occurred, the first office paid the entire loss, whereas it was liable to pay only its proportion with the other offices. The second office being sued by the insured for its proportion, claimed that the contract being one of indemnity, the insured was not entitled to recover more than his loss, which had already been paid. But the court held that this was

no defence. After the first company had paid the loss, the suit against the second office was declared to be for the use of the first office, and the name was changed accordingly.

<sup>2</sup> The date often becomes a very important part of a policy. The decisions, however, only establish that, when the execution and delivery of an instrument are subsequent to the date, the error may be corrected; when they precede the date, whether the necessary correction can be made in a court of law, is, upon the authorities, exceedingly doubtful. See 1 Duer, *Ins. n.* XVIII. p. 153, as to foreign laws in this respect. Mr. Arnould states the rule in England to be, that every underwriter shall set down day, month, and year on which he subscribes the policy. 1 *Ins.* 39. And such is also the practice in this country; and in time policies the hour is usually stated. *Stone v. Ball*, 3 Lev. 348; *Earl v. Shaw*, 1 Johns. Cas. 313; *Jackson v. Bard*, 2 Johns. 220, 234; *Hall v. Cazenove*, 4 East, 477. In *United States v. Le Baron*, 19 How. 73, Mr. Justice Curtis says: "The



a date, as all policies do, unless by mere inadvertence. This date affords this evidence; for this word "date" is only another form of the Latin word "datum," which was always used in its place when contracts were written in Latin. The word "date" then means that the policy was *given* and received on that day; but it has been held that this evidence is not conclusive. It raises a presumption which is strong, but may be overcome by evidence, showing that the policy was given and received on another day, and it will then take effect from its actual making and delivery.

### SECTION XI. — *Of the Law of Place.*

THE law of place sometimes comes into consideration. Here the most general rule is, that every contract is to be considered as made in accordance with the laws of the place where it is made, and is to be interpreted in conformity with them, and the place where a contract is made is the place where it becomes finally executed and valid. Thus if an insurance company has an agency in another state or country which is authorized to receive applications for insurance, but is not authorized to complete the contract, and must remit the applications to the company by whom alone it can be completed, it is held that the contract is made in the place where that company has its home, and is to be governed by the law of that place.<sup>1</sup>

delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date."

<sup>1</sup> *Hyde v. Goodnow*, 3 Comstock, 266; *Western v. Genesee Mut. Ins. Co.* 2 Kern. 258. In the first case an insurance company in New York had an agent in Ohio authorized to receive applications for insurance, but not to complete the contract. It was held, under these circumstances, that a policy issued by the company in New York to a person in

Ohio was to be governed by the laws of New York, and that a law of Ohio, declaring void all policies signed, issued, or delivered in the State by a company not chartered by a law of the State, or by a licensed agent, did not apply. *Harris, J.*: "Before the company acted upon the propositions, and had agreed to insure, the transactions were wanting in that mutuality which is essential to a valid contract. But when the company, having received the applications accompanied with the notes, consented to insure, and issued its policies, what was before revocable became irrevocable, and invested with the attributes of a contract. If this be so, the contracts



If a corporation is established in one state, and has an agent in another state who is duly authorized to make insurance contracts, and is furnished with blank policies, signed by the officers of the company, in which it is declared that they shall not take effect until countersigned by the agent, a policy so countersigned and delivered is considered as a contract made in the latter state without any reference to the domicile of the corporation.<sup>1</sup> ♦

Where the contract is made in one place, and is to be executed or take effect in another, the general presumption of the law undoubtedly is that the parties intended that the contract should be governed and interpreted by the law of the place where it is to go into effect.<sup>2</sup> But the application of this rule to policies of insurance seems to require or to admit some qualification of it. There is at least a conflict of authority on this subject. By the word "coppered vessel" it appeared by evidence that one thing was meant in New York, and another thing in Boston. In New York it meant a vessel coppered down to the keel. In Boston it meant a vessel

are to be regarded as having been made when the company received and accepted the defendant's applications, and issued and transmitted to him their policies. Of course they were contracts made in the State of New York, and not in Ohio. The insurance was not effected in Ohio, nor were the policies 'signed, issued, or delivered' there. The case, therefore, is not within the prohibitions of the statute." The second case is almost precisely the same. *Johnson, J.*: "The contract was consummated by the final assent on the part of the company, and upon that event, and not upon its delivery, became operative. The validity of the contract is, therefore, to be determined by the law of New York. Here it was made and here it was to be performed." See *Wright v. Sun Mutual Ins. Co. of N. Y.* U. S. C. C. Md. 6 Am. L. Reg. 485, 12 Cush. 422.

<sup>1</sup> *Heebner v. Eagle Ins. Co.*, 10 Gray, 143.

<sup>2</sup> In *Hyde v. Goodnow*, 3 Comst. 266, this point is remarked upon by the court: "It is a general rule of international law, that the *rights* of the parties to a contract, as distinguished from their *remedies*, are to be determined by the law of the place where the contract is to be performed. If a contract be made in one state or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract." 2 Pars. Cont. (5th ed.) 583 *et seq.* An exception, however, to this rule exists where the contract is declared void by the law of the state or country in which it is made, but would be valid in the place where it is to be performed. In such a case the contract cannot be enforced in either place. *Hyde v. Goodnow, supra.*

in which the keel was coppered as well as the bottom planking. The difference perhaps arising from the fact that Boston vessels were then more commonly than New York vessels sent to navigate tropical waters where worms are more destructive and dangerous. The insurance was effected by means of a letter written in New York to Boston. The ship belonged in New York, and the owner lived there. The letter described the ship as a coppered vessel, and the Supreme Court of the United States held that the phrase should be construed in the New York sense,<sup>1</sup> overruling the decision of Judge Story that the phrase should be interpreted as it was understood in the place to which it was written, and in which the insurance was effected. It is easy to suppose cases in which this ruling would seem to work injustice. Let us suppose that a merchant in Calcutta writes to Boston requesting insurance of his vessel, and in his letter uses phrases in the description of his vessel which have a definite, reasonable, and well-established meaning in Boston, and which phrases would not of themselves suggest to any one that they had any other meaning anywhere. The insurance is made as requested on the description in the letter, would it be thought right to attach to the policy a very different meaning which these words had at Calcutta?

It should, however, be remarked that Judge Story had before this case had one before him for his decision, which arose on a policy of insurance which had been effected in Boston on a letter from the British Provinces, and in which case the question of seaworthiness arose, and it was proved that sea-worthiness meant one thing in Boston and another thing where the vessel belonged. The Judge here decided that insurers should be presumed to know what constituted sea-worthiness at the port at which the vessel they insured belonged, and that the meaning of the word at that port should prevail in the construction of the policy. The Supreme Court in the case of the coppered vessel approved of this decision, and held that the principle of it applied as strongly to a representation.<sup>2</sup>

<sup>1</sup> Hazard's *Adm. v. New England Mar. Ins. Co.*, 8 Peters, 557, overruling same; 1 Sumner, 218.

<sup>2</sup> *Tidmarsh v. Washington Fire & Mar. Ins. Co.*, 4 Mason, 442. The insurance was in this case made in Bos-

ton upon a British vessel belonging to the port of Halifax in Nova Scotia. The court say: "If the Boston standard of sea-worthiness should essentially differ from that in Halifax in respect to equipments for a South American voy-

SECTION XII. — *What Questions of Construction are for the Court, and what for the Jury.*

THE question of construction of written papers is always in all its parts a question of law for the court;<sup>1</sup> but it is sometimes not age of this sort, it would be pressing the argument very far to assert that the vessel must rise to the Boston standard before the policy could attach. Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to the equipments of vessels of that class for the voyage on which she is destined. He must be presumed to underwrite upon the ground that the vessel will be seaworthy in her equipments, according to the general custom of the port, or at least of the country to which she belongs." This language is cited with approbation and adopted by the court in the decision of the case of *Hazard's Adm. v. N. E. Mar. Ins. Co.*, in the Supreme Court *supra*, in which the insurance had been effected in Boston, the letter ordering insurance and using the words "coppered ship" having been written at New York. The court say that when the assured made the representation his mind would be directed, not to Boston, but to his ship in the harbor of New York, and that in using the term "coppered vessel" he would use it in reference to the understanding of that term at New York. And that the minds of the Boston insurers, seeing that the letter was written at New York, and related to a vessel in that harbor, would naturally be directed to the sense of the terms as there used, and would inquire whether the words "coppered ship" mean the same thing at New York as at Boston. "In a case of sea-worthiness such is admitted to be the rule, and if applicable to that case it must be equally so to a case of representation." The ground of decision in these cases then would seem to be that while the contract is to be governed by the law of the place where it is to be performed, yet as usage always, unless expressly excluded, forms a part of every contract, and as it is the underwriter's duty to be acquainted with the usage of the place whence came the proposal, this usage forms part of the policy just as much as though it had been expressly referred to and adopted in the policy, and therefore exercises its share in the controlling of the contract. In effect, it is like the case of the express adoption of the usages of a foreign port. 1 Arn. Ins. (Perkins's ed.) 71, note; 1 Duer, Ins. 263, § 507.

<sup>1</sup> 2 Pars. Cont. (5th ed.) 492, 493, and notes; Id. 556. "The construction of all written contracts belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them." Per *Parke, B.*, in

easy to draw the dividing line between the law and the fact in questions of construction. Thus, if there be technical words of which the meaning is disputed, and experts are called to determine this meaning, what the words mean is a question of fact for the jury, but the effect of this or that meaning on the instrument is matter of law for the court, and they would generally instruct the jury that with one meaning of the words in dispute the instrument has this force and effect, and with another meaning, that force and effect.<sup>1</sup>

*Milson v. Hartford* 8 M. & W. 806, 825.

The case of *Lloyd v. Maund*, 2 T. R. 760, seems *contra*, but that case was substantially overruled in *Morrell v. Frith*, 3 M. & W. 402. "If I am called on to give an opinion," said *Parke*, B., "I think the case of *Lloyd v. Maund* is not law." Where the evidence of a contract consists in part of written evidence and in part of oral communications or other unwritten evidence, it is left to the jury to determine upon the whole evidence what the contract is. *Morrell v. Frith*, 3 M. & W., per Lord *Abinger*; *Edwards v. Goldsmith*, 16 Penn. St. 43; *Bomeisler v. Dobson*, 5 Whart. 398.

The court decides on the sense and construction of the common words and phrases of the language, where no peculiar meaning is proved. There is therefore no occasion for evidence of such meaning, since this meaning is presumed to be known to the courts. The meaning of technical words, or common words and phrases used in a technical or local sense, and of words other than the common words of the language, is for the jury. "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and

that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical, or peculiar sense, it is the province of the court to put a construction upon the written contracts and agreements of parties, according to the established use of language, as applied to the subject-matter, and modified by the whole instrument, or by existing circumstances." Per *Shaw*, C. J., in *Eaton v. Smith*, 20 Pick. 150; *Burnham v. Allen*, 1 Gray 496; *Brown v. Orland*, 36 Maine 376. See also *Armstrong v. Burrows*, 6 Watts, 266, per *Gibbs*, C. J.

So the reasonableness of a usage may be a question for the court, but whether the usage in question comes within the general construction of reasonableness is generally for the jury. See *ante*, p. 103, n. 1; *Ougier v. Jennings*, 1 Campb. 505, n.; *Carter v. Boehm*, 3 Burr. 1905; *Simons v. Boydell*, Doug. 255; *Eyre v. Mar. Ins. Co.*, 6 Whart. 247, 5 S. & W. 116.

<sup>1</sup> *Armstrong v. Burrows*, 6 Watts, 266; *Cabarga v. Seeger*, 17 Penn. St. 514; *Jackson v. Ransom*, 18 Johns. 107;

SECTION XIII. — *Of Alterations.*

WHETHER or not there be an alteration is a question of fact for the jury, and the court should decide upon the effect of the alteration, so far at least as its materialism is concerned. It has indeed been held error for the court to leave the question of materiality to a jury.<sup>1</sup>

There is no doubt that any parties that make a bargain may agree to terminate the bargain, whether it be oral or written. And if a policy of insurance be cancelled by agreement of the parties, or, what is the same thing, by the act of one and the assent of the other, and in whatever way this cancelling is affected, the policy is thereby wholly annulled.

So also it is certain that if the parties agree not to annul the bargain, but to vary it, they may do this to any extent and in any way they choose. But upon the questions, what is sufficient evidence of assent, and what is the effect of attempted alteration without assent, there has been much litigation and diversity of opinion.<sup>2</sup>

*Sheldon v. Benham*, 4 Hill, 129; *Dana v. Fiedler*, 2 Kern. 440. In *Remon v. Hayward*, 2 A. & E. 666, it is said, that a question arising at *Nisi Prius*, before Lord *Danman*, from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, his lordship decided the question himself, and refused to have it put to the jury.

<sup>1</sup> "Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether the erasures and alterations were material or not was a question of law which ought to have been decided by the court." *Trimble, J., Steele's Lessee v. Spencer*, 1 Peters, 560. And accordingly the instruction in the court below referring the question of materiality to the jury, as well as the fact of alteration and erasure, was not

sustained. To the same effect, see *Stephens v. Graham*, 7 Serg. v. Rawle, 505. The court below had directed the jury to find for the plaintiffs, if in their opinion the alteration was immaterial, for defendant if material. The court on error reversed the judgment, and held this direction to be wrong. It was a question of law. Materiality of an alteration is for the court. But whether made by consent, or with fraudulent motives, must be settled by the jury. *Powers v. Jewell*, 2 N. H. 543, 1 Arn. 55.

<sup>2</sup> A material alteration in the terms of the policy, to which the underwriters have duly assented, when inoperative from the omission of a stamp, is yet effectual to avoid the policy. Although the want of a legal form prevents it from being received as evidence of a new contract, it is yet regarded as a complete expression of the will of the

The general rule as to alterations of policies of insurance is the same with the universal rule of the law of contract, namely, that a material alteration of a written contract made by one party, without the assent of the other, avoids the contract.<sup>1</sup>

parties to abandon their former agreement. 1 Duer, Ins. 87; 1 Arn. Ins. 62; *French v. Patton*, 9 East, 351. Lord *Ellenborough* said that "the altered policy, though ineffectual as an instrument to sue on, was effectual to do away with the former agreement, which was thereby abandoned," p. 355; and *Le Blanc, J.*, p. 357, asks "how the court can enforce an agreement, after the parties themselves, upon the very face of the same instrument, have declared that it is not their agreement, and have actually written another and a different agreement in the place of it." Mr. Duer doubts the propriety and justice of this decision, and thinks the true ground of the decision was that a different construction would lead to frauds upon the revenue. 1 Duer, Ins. 87.

<sup>1</sup> And this, whatever may have been the object or motives of the party in making the change, and in whatever mode it is effected, whether by an erasure, an interlineation, or an addition in a blank space. And there would seem to be no reason why it would not produce the same effect when the alteration is made by words written in the margin. But this has been doubted. *Richardson, J.*, in *Forshaw v. Chabert*, 6 Moore, 386. In this case the language of Lord *Ellenborough* is cited with approbation, that "the plaintiff's own act had made, as far as he could make, the policy speak a different language from what he now insists that it does, and he must take the consequences." The policy was on ship and goods from Cuba to Liverpool, with liberty, &c., and the assured, after the

subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," to which the defendant did not, though other underwriters did, agree, without increased premium. This was held a material alteration and to avoid the policy as to defendant. And this principle is applicable to all instruments alike. *Master v. Miller*, 4 T. R. 320; *Chitty, Contr.* (5th Am. ed.) 783 *et seq.* Even when made with the expectation of getting the underwriter's consent. See *Langhorn v. Cologan*, 4 Taunt. 330; *Fairlie v. Christie*, 7 Id. 416; *Laird v. Robertson*, 4 Brown, P. C. 488; *Campbell v. Christie*, 2 Stark. 64. See *Entwisle v. Ellis*, 2 H. & N. 549; 1 Phill. Ins. 76, § 113.

But an alteration by the insurers, without the consent of the insured, has no effect whatever. *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray, 204, where an open policy was given on "property on board vessel or vessels," &c., "as per indorsements to be made." Subsequently an agreement was made by the plaintiffs with the agents of the defendants in Boston to insure certain cotton at and from New Orleans to Boston, and to take the risk of fire on land at New Orleans. Some of the cotton was there burned. After the news reached Boston, the agents made the indorsements on the policy, but added a qualification, which had not been agreed upon, and which would have prevented a recovery. Held, that the agents had no power to alter the terms of the contract, and that the subsequent qualification, not being part of



But in the first place to have this effect it must be material; for if it be immaterial, either from its total want of value or importance,<sup>1</sup> or because it only expresses something already included by legal construction in the policy, it would not avoid the policy.<sup>2</sup> Even

the contract, was void, and defendants were therefore liable.

In the United States there is no restriction on the right of the parties to alter their original contract at any time and in any manner they may deem expedient; but in England, although certain alterations are permitted to be made without the addition of a stamp, those that seem the most material, if unstamped, are wholly invalid. The reasons for this rule are plain, and rest on public policy. A material alteration "destroys the policy," by destroying its identity. And out of this reason grows the next rule, or rather simply another aspect of the same rule, that where the alteration is immaterial, either because unimportant, or because it adds nothing to the implications of law in the construction of the policy, the contract retains its identity, and consequently its legal force. See next note.

<sup>1</sup> In the cases of *Sanderson v. M'Cullom*, 4 J. B. Moore, 5, and *Sanderson v. Symonds*, 1 Brod. & B. 426, 4 J. B. Moore, 42, the policy contained a liberty to the vessel insured "to sell, barter, and exchange goods at any of the ports to which, under the terms of the policy, she might proceed during her stay." The insured, fearing the original words might be insufficient, added the words "and trade" after the sentence given above. Some of the underwriters assented to it by signing their initials; but, among others, defendant did not. It was held that all were still liable, because the alteration was immaterial and the contract unchanged, and that defendant would have been liable had no

such words been introduced. *Falmouth v. Roberts*, 9 M. & W. 469. See also *Hatch v. Hatch*, 9 Mass. 311, per *Sewall*, J.; *Smith v. Dunham*, 8 Pick. 246; 1 Greenl. Ev. 633; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Nichols v. Johnson*, 10 Conn. 192; *Smith v. Crooker*, 5 Mass. 540, per *Parsons*, C. J. But see *contra*, *Chitty*, Cont. (5th Am. ed.) 784. *Chitty* refers to *Pigot's case*, 11 Coke, 27 a, and to *Shep. Touchst.* 89, where it is laid down that, "if the obligee himself alter the deed, although it is in words not material, yet the deed is void." And see *Jackson v. Malin*, 15 Johns. 293; *Wright v. Wright*, 2 Halst. 175. But *Pigot's case* was an action on a bond, and the language in *Touchstone* is based on *Pigot's case*.

<sup>2</sup> An alteration of a written instrument by the insertion of a word which the law would supply will not annul the contract, although interlined by the party holding the instrument, without consent. See *Hunt v. Adams*, 6 Mass. 519; *Smith v. Crooker*, *supra*; *Hatch v. Hatch*, *supra*, 1 Greenl. Ev. § 567, and cases cited. Chief Justice *Parsons*, in delivering the opinion of the court in *Hunt v. Adams*, says: "As to the alteration, it is an old rule that any alteration, whether material or not, in an instrument, made by the party to whom it is given, shall avoid it, unless made by the consent of the party who executed it. But in a simple contract which is merely evidence of a promise, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principle of deeds, which, from



then, however, if fraud were alleged it might be evidence of fraud, and fraud annuls a policy as it does every contract.<sup>1</sup>

It has been said, "where the alteration is not material it will not vitiate the policy *in toto*, but, in such case, if some of the underwriters have consented to the alteration, after the policy is executed, and others refuse, those who consent make the altered instrument their own; but those who do not, remain liable on their original contract."<sup>2</sup> But we do not quite understand this, for if the alteration be not material, how can those parties who are bound by it be placed in a different condition from those who are not so bound? On the other hand, if the alteration be such that it lessens, or enlarges, or otherwise varies the obligations, does not this circumstance prove it to be material?<sup>3</sup>

the alteration, may not be the deeds of the parties; while a similar alteration in a written simple contract might leave it complete evidence of the same contract."

Where the policy was originally filled up "on the Three Sisters at and from Cadiz and Seville to Liverpool," and, after it had been signed by the underwriters, the broker inserted the words, "Tres Hermanas or" and "both or either," Lord *Ellenborough* held the defendants liable. The mere calling the ship by an English name did not amount to a warranty of nationality. No harm, therefore, could arise by inserting "Tres Hermanas" in the policy, that being a mere translation of the "Three Sisters." And since the ship had the option of going both to Cadiz and Seville or not, as it might suit the exigencies of the adventure, the words "both or either" gave her no additional liberty. The legal operation of the instrument is in no degree affected. *Clapham v. Cologan*, 1 Campb. 382.

<sup>1</sup> 1 Phill. Ins. 76; *Nunnery v. Cotton*, 1 Hawks, 224, per *Taylor*, C. J. But if the alteration be fraudulently made by the party claiming under the instru-

ment, it does not seem to be important whether it be in a material or an immaterial part, for, in either case, he has brought himself under the operation of the rule established for the prevention of fraud, and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences. 1 Greenl. Ev. 638, Id. 634. And it is *prima facie* evidence of fraud, if an obligee procure a person who was not present at the execution of the bond to sign his name as an attesting witness, unless rebutted it avoids the bond. *Adams v. Frye*, 3 Met. 103.

<sup>2</sup> 1 Arn. Ins. 55.

<sup>3</sup> 1 Arn. Ins. 55. The same statement, in the same form, is made by Mr. Duer (1 Ins. 80). "When the alteration in a policy is wholly immaterial, when the words introduced are merely explanatory, and do not at all enlarge or vary the legal import of the original terms to which they apply, the contract retains its identity, and consequently its legal force; the assent of the underwriters in such a case is wholly unimportant. Those who assent are bound by the policy as altered, those who dissent by its original form." The ex-

It is also necessary to its avoidance of the contract, that the alteration be made by a party, or by some other person with so much consent or co-operation of the party to the contract as to make him responsible for it.<sup>1</sup>

planation follows: "But the liability of both classes is precisely the same, and the distinction between the two contracts, where a suit is commenced, consists, not in the nature or extent of the relief, but solely in the form of declaring." *Sanderson v. Symonds*, 1 Brod. & Bing. 426. See also *Sanderson v. McCullom*, 4 J. B. Moore, 5.

<sup>1</sup> *Nichols v. Johnson*, 10 Conn. 192. An alteration by a stranger, though material, does not avoid the instrument. The court say that the doctrine of Pigot's case, 11 Co. Rep. 27, and also of the case of *Markham v. Gonaston*, Cro. Eliz. 626, that "when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void," has been, with good reason, supposed to have been derived from the ancient technical forms of pleading, and from principles applicable to proferta. 3 T. R. 151; 4 T. R. 821. But whatever may have been the origin of this principle, it has been much relaxed, if not entirely subverted, in later times, so far as it extends to the acts of strangers. As early as the reign of Charles II., it was decided that a deed was not made void the seal of which had been torn off by a little boy. *Palm*. 413. And in *Jackson v. Malin*, 15 Johns. 293, it is said by *Platt, J.*, "that a material alteration, though made by a stranger, without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not

ready to assent." In *Rees v. Overbaugh*, 6 Cow. 746, the Supreme Court of New York held, that if a stranger tear a seal from a deed, it shall not destroy it." The court in the case of *Nichols v. Johnson*, after referring to these and other cases, say: "The reasons controlling the decisions in these cases seem entirely applicable to the present, and wholly inconsistent with the old doctrine of Pigot's case, in its application to the act of strangers to the deed. Indeed it can hardly be conceived, if a deed or other instrument in writing is not rendered inoperative by either a mistaken alteration, or its loss, or even entire destruction, how it can be by an unauthorized intermeddling of a stranger." See also *Lewis v. Payne*, 8 Cow. 73.

In a recent English action on a charter-party the opposite doctrine seems to be held. *Croockewit v. Fletcher*, 1 H. & N. 898. This was an action by an owner of a vessel against the charterers for refusing to take the vessel; the defendants pleaded, that whilst the agreement was in the possession of the plaintiff, it was, without the knowledge or consent of the defendants, altered in material particulars (setting them forth), that the alteration was not made in correction of any mistake or to further the intention of the parties, by reason whereof the agreement became void. It appeared in evidence that after the charter-party was signed, the agent of the plaintiff made the alterations complained of, and stated the fact to the defendants when he handed the instrument to them, and on their saying that

Usage may show this authority. It has been held that where an alteration had been made by the secretary, and it was shown that this was the practice of the company, this would make his act valid, and we know no reason why the same rule would not apply to any other usual and customary way of making or assenting to alterations.<sup>1</sup>

If we suppose an alteration made by the assured without the consent of an underwriter, with no fraudulent intent, but only for the purpose of obtaining the underwriter's consent, the question might arise whether it nevertheless avoids the policy, if the underwriter does not consent.<sup>2</sup> Mr. Phillips thinks it would ;<sup>3</sup> Mr. Duer,

they did not know whether they would accept it with the alterations, he said that he had made the alterations on his own responsibility, and would strike them out at once. The defendants afterwards refused to accept the instrument. The court said : " We also think that the addition to or alteration of the charter is a fatal objection to the plaintiff's right to maintain the action. It is no doubt apparently a hardship that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, a perfectly innocent man should thereby be deprived of a beneficial contract ; but, on the other hand, it must be borne in mind that to permit any tampering with written documents would strike at the root of all property ; and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts, but they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration." *Pigot's case*, 11 Rep. 26, and *Davidson v. Cooper*, 11 M.

& W. 778, were cited. The replication of the plaintiff stated that the alteration was made by a stranger, but the court said that if this had been proved to be true the defendants would have been entitled to a judgment *non obstante veredicto*. That alterations by a stranger, without the privity or default of the party interested, in an immaterial point, do not vitiate the instrument, seems never to have been doubted. *Chitty, Contr.* (5th Am. ed.) 785 ; *Pigot's case*, 11 Co. 27 ; *Wright v. Wright*, 2 Halst. 175 ; *Wickes v. Caulk*, 5 Har. & Johns. 36.

<sup>1</sup> *Warren v. Ocean Ins. Co.*, 16 Maine, 439 : " We cannot exclude from our consideration the usages of the parties." It was the uniform practice of the company, where a deviation from the risk assumed in the policy was waived by the president, for a compensation agreed upon by him and by the assured, for the waiver and assent to be written, with its terms, across the policy without any new signature, and to be recorded by the secretary ; and a contract made in that manner was held binding upon the corporation.

<sup>2</sup> See *Laird v. Robertson*, 4 Brown, P. C. 488 ; *Langhorn v. Cologan*, 4 Taunt. 330 ; *Fairlie v. Christie*, 7 Id. 416 ;

<sup>3</sup> 1 Phill. Ins. 70.

that it would not.<sup>1</sup> We doubt whether any universal rule on this subject, either in the affirmative or in the negative, would be accurate.

The answer to the question must depend on the circumstances of the case, and the character of the alteration. If this alteration were such as in fact to cancel the original policy, and propose another, the insured would not be liable on the original policy, because it had been cancelled; nor on the policy proposed, because he had not assented to it; but it is quite clear that the insured may always propose to the insurer any alteration which he desires. He may do this orally or in writing; and in either case if the alteration be not assented to the policy is unaffected. And we do not see any reason or authority for saying that such a proposed alteration, if written on the policy itself, would have any more effect upon the policy if unsigned than if written on a separate paper.<sup>2</sup>

*Campbell v. Christie*, 2 Stark. 64; *Forshaw v. Chabert*, 3 Brod. v. Bing. 158, 6 J. B. Moore, 369. See *Entwistle v. Ellis*, 2 H. & N. 549.

We agree with Mr. Duer that the only safe course for the assured who desires a change in the terms of his contract is to submit the proposed alteration to the underwriters, in a separate instrument that will be binding on those who consent to subscribe it, without varying the liability under the policy of those who refuse. 1 Duer, Ins. 80.

If the alteration is made by consent of parties, such as by filling up of blanks, or the like, it is of course valid. *Markham v. Gonaston*, Cro. Eliz. 626; *Zouch v. Claye*, 1 Ventr. 185, 2 Lev. 35. And this consent may be implied. *Hale v. Russ*, 1 Greenl. 334; per *Kent*, Chanc. in 19 Johns, 396; *Smith v. Crooker*, 5 Mass. 538; 1 Greenl. Ev. 635, § 568.

So where the absence of a stamp renders void the policy as altered, it is held that the assured cannot then recover upon the policy in its original state, by reason of the alteration apparent on the face of the instrument it-

self, and made by parties interested. "Can the court enforce an agreement after the parties themselves have, upon the very face of the same instrument declared that it is not their agreement, and have actually written another and a different agreement in the place of it? And I cannot say that it is the same thing as if the memorandum had been written on a different instrument; for it is inserted in the body of the original agreement, and makes it speak a different language. It shows an entire alteration in the minds of the contracting parties." *French v. Patton*, 9 East, 357.

<sup>1</sup> 1 Duer Ins. 79.

<sup>2</sup> Strong doubts have been expressed by an eminent judge whether an alteration made without fraud by writing in the margin of the policy, or by an indorsement, ought in any case to be construed as affecting the integrity and validity of the original contract. *Richardson, J.*, in *Forshaw v. Chabert*, 6 J. B. Moore, 386. And this view, at least in so far as it relates to an unsigned memorandum on the back of the policy,

The question then would be, whether the proposed alteration were such as of itself to cancel the original policy, or whether it were only a suggestion, or offer, or request, such, and so written, as to leave the insurers at liberty to refuse it, and then leave the parties bound as before to the original bargain.

In two cases the question has arisen where the alteration was material, and the underwriters were many, and the alteration was made with the intention of getting their assent, and some of them did assent, others did not. An action being brought on the original policy against the dissenting insurer, it was held that he was discharged, on the ground that the policy had been materially altered.<sup>1</sup>

It seems to be clear, however, that if there be many insurers,

would seem to be reasonable. Where a new clause, whether written in the margin or indorsed, has a new date affixed to it, subsequent to that of the policy, and there is no alteration in the body of the instrument, we should say the new clause did not destroy the identity of the contract, nor avoid its force; since the invalidity of the alteration, when not signed by the insurers, is then apparent on its face, and hence the possibility of fraud is excluded. In this we agree with Mr. Duer, 1 Ins. 82.

<sup>1</sup> *Forshaw v. Chabert*, 6 Moore, 369. The insurance was on ship and goods "at and from Cuba to Liverpool, with liberty," &c.; the assured, after the subscription of the policy, inserted in the body of it the words "with leave to call off Jamaica," which was acquiesced in by all the underwriters except the defendant, without increase of premium. Held, that this was a material alteration, and avoided the policy as against the defendant. And this, though defendant had never refused to sign it, and the only reason for its not having been presented to him, as to the rest of the underwriters, was his absence in a distant part of the country. Though

Ld. Ch. J. *Dallas* says the case must be decided on legal grounds, all the judges regret the necessity of doing so, and strongly condemn the moral injustice of the particular case. *Langhorn v. Cologan*, 4 Taunt. 330. The policy was executed in the printed form, without any specific subject of insurance being inserted in writing. Plaintiff afterwards inserted the subject-matter, and the addition was signed by some of the underwriters only. Held, that the underwriters who did not sign were discharged, because the contract was altered by the insertion.

Striking out the signature or other material words by the insured is a cancelling of the policy.

Thus in *Fairlie v. Christie*, 7 Taunt. 416, the assured, after subscription, struck out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserted in a memorandum in the margin a different time for sailing, which the underwriter did not sign. Held, that the assured thereby destroyed the policy, and the underwriter was discharged from the original contract.

and a party of them agree to vary the terms of the insurance, and this agreement is written on a separate paper, leaving the policy unchanged, the insurers making this new agreement would be bound by it, while the other insurers are bound by the policy.

The question has arisen, whether an oral agreement to vary the terms of the policy could be permitted to have that effect. The ancient rule requires that any alteration of an instrument, to be effectual, must be made by another instrument of equal force. A policy is not a specialty, but it is a written agreement, and by this rule could be varied only by another written agreement. But it is now the law, that a written contract may be varied by oral agreements, entered into by the parties before any breach of the stipulations. Under this more modern but well established rule, alterations made orally by the parties would vary the contract of insurance.<sup>1</sup> The authorities are not quite uniform

<sup>1</sup> In *Union Mut. Ins. Co. v. Commercial Ins. Co.*, 2 Curtis C. C. 524, affirmed in 19 Howard, 318, it is said: "And Mr. Phillips's and Mr. Duer's treatises were referred to to show that they consider that an oral contract for a policy is not binding. But the question whether such a contract is valid must be determined, in the absence of any statute, by the common law; and I am not aware of any grounds upon which it can be maintained that the common law requires a contract for a policy of insurance to be in writing. It is not sufficient to say that by the law merchant the insurance must be effected by a written policy. . . . In Massachusetts, a corporation can make insurance only by a policy in writing, signed by its president and countersigned by its secretary. But there is no statute of frauds which includes contracts for policies. . . . The requirement of the signature of the president and secretary is limited to the policy." Then, referring to similar decisions in other States, the court continue: "This seems to me to be in conformity

with the common law, and I find nothing in any statute of the State of Massachusetts to conflict with it." So, in *Sandford v. Trust Fire Ins. Co.*, 11 Paige, 547, though the Chancellor did not find it necessary to decide this question, he intimated an opinion that he should have held a parol contract for insurance valid if one had been proved. And in *Hamilton v. Lycoming Ins. Co.*, 5 Barr, 339, the Supreme Court of Pennsylvania held an oral contract for insurance to be binding on the insurers.

In New York, in a case where similar formalities were required by the charter of the company, it was held that a parol contract is not binding. *Spitzer v. St. Mark's Ins. Co.*, 6 Duer, 6. But that the contract may be oral only, and yet binding for many purposes and under many circumstances we have already seen. And see *Jeffery v. Walton*, 1 Stark. R. 267. And as a parol contract for insurance is valid, it might seem to follow that the policy may be altered by parol. In *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray, 204, *Merrick*,



on this subject. The more usual, the better, and the safer practice is, that the alterations should be written, and also the assent of the insurers.<sup>1</sup> But while their assent is often, perhaps usually,

J., said: "It is now a perfectly well-settled doctrine, that a written contract may be materially varied and changed by subsequent agreements, orally entered into by the parties, before there has been a breach of its stipulations." *Goss v. Nugent*, 5 B. & Ad. 58. Lord *Denman* says in this case: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner add to or subtract from or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." And this has been held although the original contract falls within the operation of the statute of frauds. *Cummings v. Arnold*, 3 Met. 486.

But where the charter of the company required that a contract for insurance should be in writing, signed by the president and secretary, it has been held that a contract to cancel or vary a policy must be evidenced in the same way. *Head v. Providence Ins. Co.*, 2 Cranch, 127, 168. "A contract varying the policy," say the court, "is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law." See also *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, where the court express themselves in strong terms: "It is universal commercial usage that the policy shall be in writing, and there is

no exception to it in positive decision or municipal regulation. Such a thing as a verbal policy is unknown to the law of insurance." And the same reasons which would require the original policy to be in writing would require a subsequent agreement to be in writing. *Kaines v. Knightly*, Skin. 54; *Courtney v. Miss. M. & T. Ins. Co.*, 12 La. 233; *Berthoud v. Atlantic M. & F. Ins. Co.*, 13 La. 539; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Sandford v. Trust Fire Ins. Co.*, 11 Paige, Ch. 547.

<sup>1</sup> *Head & Amory v. Prov. Ins. Co.*, 2 Cranch, 127, *supra*; *Robinson v. Tobin*, 1 Stark. 336; *Kaines v. Knightly*, Skin. 54; 1 Arn. Ins. 53, 54. "The only ground," says Arnould, "upon which a written alteration of this kind can be binding upon any parties to the original policy arises from his having signified his assent thereto by his signature." *Campbell v. Christie*, 2 Stark. 64. *Forshaw v. Chabert*, 3 B. & B. 153. And when it alters the risks to the prejudice of the assured, or imposes upon him a new obligation, if contained in a separate instrument, his signature is also requisite. If the change be made with his assent, by an alteration in the policy, it would probably conclude him without his signature. The most usual form of an agreement for the alteration of the terms of a policy is by a memorandum on the back of the policy; and, by practice and decisions in England, the assent of the insurer is in all cases sufficiently proved by the subscription of his initials. *Forshaw v. Chabert*, *supra*; *Langhorn v. Cologan*, 4 Taunt. 330. But in *Merry v. Prince*, 2 Mass. 176, it was held that an indorsement on the policy substitut-



verified by their signature, in full or by initials, it cannot be said that any signature is essential. It has been held that where certain alterations were inserted in a policy by the insurers, without any further signature by them, they were bound. This case was peculiar in its circumstances and very instructive as to the manner in which insurance companies are bound by the acts of their offices.<sup>1</sup> We have said that any alteration may be made by the

ing one underwriter for another was binding on the substituted underwriter and the assured, although it was only signed by the insurance broker.

<sup>1</sup> In *Warren v. Ocean Insurance Co.*, 16 Maine, 439, the alteration was inserted in the policy by consent of both parties, but not signed. It was held valid. This action was one of assumpsit on a policy of insurance on the brig *Pactolus*, for her voyage from Havana to her port of discharge in the United States. After the policy was executed, the plaintiff received a letter from the master, saying that he was at Havana partly loaded, and should proceed next day to Matanzas to finish loading. Plaintiff therefore desired liberty to go to Matanzas, and accordingly the following words were written by the secretary across the face of the policy: "The brig herein named, with cargo, has liberty to proceed from Havana to Matanzas to finish loading, and the risk to be continued at and from thence to her port of discharge in the United States," &c. In going from Havana to Matanzas the vessel was lost by perils of the sea. In the company's by-laws there was a provision, that "on concurrence of the president, or in case of his absence or sickness, on the approbation of two directors, as to the terms of insurance, the secretary shall then proceed to fill up and execute such policy, which, when completed, is to be immediately recorded, and shall be con-

sidered binding on the company and on the insured," &c. In the course of the negotiation for liberty to go to Matanzas, after the secretary had written the agreement upon the policy, before he had recorded it, and while in the act of so recording, two of the directors came in with the news of the loss of the *Pactolus*. The secretary ceased writing, and the president and one of the directors told him to stop where he was. Upon this state of facts, the defendants contended that the evidence did not prove that any contract was made and completed, the contract not being first written, signed, and recorded, according to the by-laws of the company. The case of *Head & Amory v. Prov. Ins. Co.*, 2 Cranch, 127, was relied on by defendants. The question in that case was whether a certain paper, written by the secretary, but not signed, was a settlement or cancelling by the president and directors. What is decided there is, that the act of incorporation is to the defendants an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. It is said in the opinion that a contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law. The court, after re-

agreement of both parties, but not by either alone, and this rule is equally applicable to one party as to another. Although the assured, by an unauthorized alteration, may deprive himself of all remedy under the policy, he has no right, even in cases exempt from fraud, to consider the contract as wholly rescinded, so as to entitle him to demand a repayment of the premium. When the contract is yet imperfect and inchoate, the assured, by preventing the inception of the risks, may prevent it from becoming operative, and in effect dissolve it; but in no other case can he release himself by his own act from his own obligations.<sup>1</sup>

ferring to this case, say: "In the present case, there was no agreement to vacate the first policy, but merely to heal the infirmity resulting from the deviation. The inquiry now is rather a question as to the effect of evidence, whether the company, through their officers, have assented to the proposition of the plaintiff for the healing, and acted under it conformably to the requisition of the charter and by-laws of the corporation. The verdict has established that it was the same policy, and that the healing was completed. . . . On the evidence we find that all the important acts to complete the contract, as between the parties, were done before the secretary began to record the healing. This particular matter was to be performed principally for the benefit and accommodation of defendants. We must regard the previous signing by the officers was by them approved and adopted as sufficient as to the healing clause, without a reiteration of the form of running over with a pen the same letters of their names. The beginning to record the healing was such a subsequent act, as on this part of the subject carries indubitable presumptive evidence that all the previous necessary forms had been complied with. We cannot exclude from our consideration the usages of the

parties, which we consider were rightly introduced in proof."

<sup>1</sup> Langhorn v. Cologan, 4 Taunt. 330. In this case the policy was in the usual printed form, "upon any kind of goods and merchandises, and also upon the body, tackle, &c., of the ship, &c., at and from," &c., no words in writing, descriptive of the specific subject of insurance having at that time been inserted. No value was declared. The plaintiff afterwards inserted the words, "100 hhds. fine sugar, 60 hhds. molasses, and 20 tons fustick." Several of the underwriters assented, but defendant did not. *Mansfield, C. J.*: "As to the return of premium, suppose the assured tears the seal off his policy, can he by his own act compel the assured to return the premium? The underwriter has fulfilled all his part; the assured can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract."

There are circumstances, however, under which it is in the power of the insured to avoid the contract. For the contract is, substantially, a promise by the insurers to indemnify the insured against a certain risk if that risk be incurred, and a promise of the insured in return to pay premium to the insurers

No one would suppose that the insured could at his own pleasure announce to the insurers that he had rescinded the policy, and thus absolved himself from his obligation to pay the premium; and it is equally true that the insurers have no such power. A company may become insolvent, and for that reason vote to cancel all their policies, but this vote with notice thereof to the insured does not put an end to the contract, even if *pro rata* premium is offered to be returned to him, unless the insured consents to this rescission.<sup>1</sup> And it has been held that if this vote of annulment be conditional, it has no more validity unless assented to.<sup>2</sup>

if their promise of indemnity attaches. If therefore no part of the risk attaches, either because no part of the goods is shipped (*Martin v. Sitwell*, 1 Show. 156; *Graves v. Mar. Ins. Co.*, 2 Caines, 338; *Waddington v. Union Ins. Co.*, 17 Johns. 23), or because no part of the voyage takes place (*Forbes v. Church*, 3 Johns. Cas. 159; *Murray v. Col. Ins. Co.*, 4 Johns. 443), or because the insurance was predicated on a fact about which the parties were mistaken (as a blockade. *Taylor v. Sumner*, 4 Mass. 56), or because the insured had no interest (*Routh v. Thompson*, 11 East, 428), or because the vessel was unseaworthy, and consequently the risk never attached (*Porter v. Bussey*, 1 Mass. 436; *Taylor v. Lowell*, 3 Id. 331; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21, 23; *Scriba v. Ins. Co. of N. A.*, 2 Wash. C. C. 107), and in all such cases the whole premium is returnable. This rule gives to the insured the power of avoiding the contract, in whole or in part, after it is made. "Where the risk has not been run," says Lord *Mansfield*, "whether it be

owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned." *Tyrie v. Fletcher*, Cowp. 666. See *post*, chapter on Premium.

But the assured cannot annul the insurance by serving on the underwriters a notice of his desire to put an end to the contract, if the voyage is not actually abandoned. *New York Fire M. Ins. Co. v. Roberts*, 4 Duer, 141.

<sup>1</sup> "It was not in the power of the plaintiffs (the insurers) to get rid of their liabilities by a mere vote to close their business, and a notice of such vote to policy holders. The assent of the insured was necessary." *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. 433.

<sup>2</sup> In *New England Mut. F. Ins. Co. v. Butler*, 34 Maine, 451, it was held, that a vote of a mutual-insurance company, that if the assessments upon its premium notes should not be punctually paid, the contracts of insurance previously made by the party failing to pay should be suspended, was of no validity unless assented to.

SECTION XIV.—*Of Mistakes in a Policy; their Effect in Law and in Equity.*

It may be proved that there is a material mistake in the policy, and that by reason of such a mistake it does not express and conform to the intentions and agreements of the parties. If the action in which this mistake is proved be an action at law, it seems to be settled, although not without some doubts expressed, which, however, we think unreasonable, that the court has no power to correct a mistake or to avoid its effect, which must be to annul the contract.<sup>1</sup> It seems, however, to be equally well settled that a court of equity has the power to correct a mistake and reform the policy.<sup>2</sup> This has been done in many cases. From them we should draw the following principles as those which govern the court in the exercise of its power.

In the first place we apprehend that the mistake may be corrected, whether it be a mistake of law or one of fact.<sup>3</sup>

<sup>1</sup> *Constable v. Noble*, 2 Taunt. 403; *Kaines v. Knightly*, Skin. 54; *Mellen v. National Ins. Co.*, 1 Hall, 452; *Chamberlain v. Harrod*, 5 Greenl. 420; *Cheriot v. Barker*, 2 Johns. 351; *Manly v. Un. Mar. & Fire Ins. Co.*, 9 Mass. 85. In *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. 175, *Fletcher, J.*, said: "If from mistake or fraud an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act on the agreement as it is; it cannot strike out or change any part or add anything to it, so as to contradict or vary the agreement contained in the written instrument."

<sup>2</sup> *Motheux v. London Ass. Co.*, 1 Atk. 545; *Collett v. Morrison*, 9 Hare, 162, 12 Eng. L. & Eq. 171; *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419; implied by Lord Eldon, 2 N. R. 322;

*Graves v. Mar. Ins. Co.*, 2 Caines, 339; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Firemen's Ins. Co. v. Powell*, 13 B. Monr. 311; *National F. Ins. Co. of Baltimore v. Crane*, 16 Md. 260; *Dow v. Whetten*, 8 Wend. 160; *Graves v. Boston Mar. Ins. Co.*, 2 Cranch. 419, 441. See also *Baker v. Payne*, 1 Vez. 456, 1 Duer, Ins. 71; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6.

This power of a court of equity to reform a policy is only a particular application of the general power to rectify a mistake in written instruments, and the exercise of this power depends in all cases upon the same principles.

<sup>3</sup> *Oliver v. Mut. Commercial Marine Ins. Co.*, 2 Curtis, C. C. 277, 299. *Curtis, J.*: "In this class of cases I apprehend it is wholly immaterial whether the party has failed to obtain that to which he was entitled through a mistake of fact or of law." The court suppose, in illustration, a contract in writing, for

In the next place, we should say that it is an exercise of power which a court of equity, if not reluctant to make, would make only on the strongest and clearest evidence, and for the strongest reason.<sup>1</sup> Declarations of this kind have been repeatedly and em-

a valuable consideration, to convey a tract of land; and through mutual mistake of the law some legal formality is omitted, which renders the deed inoperative. Inasmuch as a court of equity would have decreed specific performance of that contract, if no deed at all had been given, so it will give effect to the contract by reforming an invalid deed. *Findlay et al. v. Hynde*, 1 Peters, 241. And the following language is adopted from *Hunt v. Rousmanier*, 1 Peters, 1: "Where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol previously entered into, but which, by mistake of the draughtsman, either of fact or law, does not fulfil, or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." Where a mortgagee applied for insurance through a local agent of a company, intending to procure an insurance of his mortgage interest, and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor, and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application, and had the policy so made in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, it was held that the mistake could be corrected by a court of chancery, although it was one of law and not of fact; the court saying: "There was a mutual mistake as to the

proper mode of filling out the papers on both sides. The application was made out in the wrong name, and the policy was made to the wrong person. But there was no fraud or misrepresentation. The papers would have been made out right if they had known how to do it, and it is immaterial whether the mistake was one of fact or of law. *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517. See also *Stedwell v. Anderson*, 21 Conn. 139.

<sup>1</sup> To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof morally irresistible. Lord *Thurlow* (1 B. C. C. 341) says that it must be "strong, irrefragable." See the remarks of Mr. J. *Story* on this language, 1 Sto. Eq. § 158. "The cases require the mistake to be made out in the most clear and decided manner," and the proof "demonstrative." Kent, Ch. 2 Johns. Ch. 633. "There ought to be the strongest proof possible." Per Lord Chancellor Hardwicke, *Henckle v. Royal Exch. Ass. Co.*, 1 Ves. Sen. 317. See also *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 419, 441; *Lyman v. United Ins. Co.*, 2 Johns. Ch. 630; *Gillespie v. Moon*, Id. 585; *Phoenix Ins. Co. v. Gurnee*, 1 Paige, Ch. 278; *Woodruff v. Columbus Ins. Co.*, 5 La. Ann. 697; *National Fire Ins. Co. of Baltimore v. Crane*, 16 Md. 260. In *Andrews v. Essex F. & M. Ins. Co.*, 8 Mason, 6, 10, Mr. Justice *Story* said: "There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a

phatically made, the reason given being that the rule which forbids the reception of parol evidence to vary a written contract is wise and salutary, and should always be respected by a court of equity, and that no mistake should be corrected unless upon evidence that was entirely clear, exact, and satisfactory. It was indeed said by Lord Thurlow (*Irnham v. Child*, 1 Brown's Chan. Ca. 94) that there had been no instance where the evidence of mistake was permitted to prevail against a party insisting that there was no mistake; this is certainly not the rule now, but the expression of Lord Hardwick, that a written contract could be reformed (1 Vesey, 319) "only on the strongest possible evidence," although thought by Mr. Duer to be "rather meant to apply to the circumstances of the particular case in which they were used than to be

material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle as any other written contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold its aid, where the mistake is not made out by the clearest evidence, according to the understanding of both parties, and upon testimony entirely exact and satisfactory." And see *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. 231.

Mr. Arnould cites, as the only well-authenticated instance in which a court exercised the power of reforming the instrument, *Motteux v. London Ass. Co.*, 1 Atk. 545. In that case, the policy was on the ship *Eyles*, and the risk was described as "to commence from and immediately after her departure from Fort St. George." In another part of the policy the risk was described to be "at and from" that fort, and the policy was proved to have been filled up from a label signed by the assured

and two of the directors of the insurance company. It was not disputed by the insurers to have been the intention of both parties that the policy should be "at and from." It seems also that the label was considered of great authority in practice. Lord *Hardwicke* decided that the policy should be considered at and from.

But the case of *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, decided in the Chancery Court of New York, exercises the direct authority of such a court in ordering the correction of a mistake in filling up a policy, on the application of the assured, the proof being "distinct, clear, and satisfactory." See also *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

Where the sole object of an alteration is to correct a mistake in an existing policy, no new stamp is required to give it validity. It is not a new contract, but an act to render operative that which already exists, and to which, as corrected, the original stamp was meant to be affixed. *Robinson v. Touray*, 1 M. & S. 217; *Sawtell v. London*, 5 Taunt. 359; 1 Duer, Ins. 86; 1 Arn. Ins. 61.



intended as a general rule," seems to us scarcely if at all too strong as an expression of the general rule. Mr. Duer himself remarks that it is owing to the strictness and difficulty of the proof that so few cases have been found in the reports in which the relief sought has been actually given.<sup>1</sup>

And in the third place a distinction has been taken which seems to rest upon sound reason. It is, that equity will interfere more readily in the correction of a mistake, in the execution of a power, than in the reformation of a written contract.<sup>2</sup> As where a policy

<sup>1</sup> 1 Duer, Ins. 133.

<sup>2</sup> In *Oliver v. Commercial Mut. Marine Ins. Co.*, 2 Curtis, C. C. 277 - 300, it was said that the courts would interfere much more readily in the correction of a mistake, in the execution of a power, than in the reformation of a written contract. In this case, the complainant, a merchant in Liverpool, being the owner of a vessel called the *Liscard*, ordered his agent at Quebec to insure a certain amount on the vessel and her freight in New York. The agent wrote to McLimont, an insurance agent in New York, to procure the insurance. McLimont then wrote to D. R. McKay, in Boston, to have this done. McLimont did not state anything in regard to the ownership. McKay made application in the usual form to the defendants. The same day the company sent to him to find out whose name was to be inserted in the policy. He therefore wrote and sent the following: "Policy for R. D. McKay, on *Liscard*, to be made out on account of A. McLimont, and payable to him or order." The policy was accordingly so made out. After the loss, the complainant brought a bill in equity, alleging that the words, "as agent and for whom it may concern," were omitted after McLimont's name. The court were of the opinion that the mistake arose in the execution of a power, and that the complainant was entitled to have the policy reformed.

As the case is one of great importance, we give the language of Mr. Justice *Curtis* on the main point, p. 293: "To state fully and precisely the grounds upon which I think this case rests, I should say that when a complete contract for a policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of his principal; and in order that this contract may take effect, power is impliedly reserved to the agent specially to declare the interest upon which the insurance is to attach, and to have such declaration inserted in the policy when drawn, or to have the policy drawn so as to insure him as agent, leaving the declaration of interest to be made afterwards, in case of loss. Either is within the known usage of agents and underwriters; and the conduct of the respondents in sending to McKay to obtain this declaration, and of McKay in making it, show, if any proof were needed, that it was understood by both he possessed this power. And when a mistake was made in declaring the interest, it was, as Lord *Ellenborough* said, a mistake in executing a power reserved to the agent by a complete and binding contract, in which power the underwriter had no interest, save that it should be rightly executed so that he may obtain the premium, and have a valid title to retain it, and over which he can justly exercise no con-



was made which purported to be "on account of A, and payable to him or order," and a loss occurred, and the complainant, being the owner of a vessel, brought a bill in equity praying that the policy might be reformed by inserting after the name of A the words, "as agent and for whom it may concern," which the court ordered.

In the next place the mistake must be perfectly innocent, for if made purposely and with any design to gain any advantage by it, this the court would regard as an attempted fraud, and would not correct. There is yet another distinction which may be considered as having much force; it is that a mistake is more readily rectified by a court of equity if the mistake be that of the party seeking relief by reforming an instrument drawn by the other party, than if the instrument were drawn by the party seeking relief, and the mistake were his own. It is quite certain, however, that a mistake has been rectified where it occurred in an instrument drawn by the party seeking relief.<sup>1</sup>

trol." There was evidence that McKay purposely, and not through mistake, declared the interest to be in McLimont, in order that they might share the scrip dividends. Mr. Justice Curtis said: "If this were so, a court of equity could not treat an attempted fraud as an innocent mistake; and though the principal, in such a case, would be in no fault, it could not relieve him, but must leave him to his remedy against his agent." The court were of opinion that though it appeared that they probably intended to take the scrip dividends, yet it did not appear that they intended to take them without the consent of their principal.

That courts interfere much more readily, and upon the footing of presumed intention, in cases of correction of mistakes in the execution of powers, than the reformation of a written contract, are cited, 1 Story, Eq. Jur. § 169-179; 2 Sugden on Powers, 94; Ashurst v. Mill, 7 Hare, 502.

<sup>1</sup> In Bull v. Storie, 1 Simon & Stuart, 210, where, however, the mistake was

admitted by the answer, it was held by the Vice-Chancellor that a mistake may be rectified even in an instrument drawn by the party seeking relief. He said: "The rule at law, that evidence is not admissible to contradict or explain a written instrument, stated *simpliciter*, is received in equity as well as at law. A court of equity does, nevertheless, assume a jurisdiction to reform instruments, which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And, of necessity, in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument. If the true agreement and the consequent mistake in the written instrument be established by the evidence, can a court of equity refuse relief because it appears that the party seeking relief himself drew the instrument, unless it be a principle in a court of equity not to relieve a party against his own mistakes? There is no such principle in a court of

## CHAPTER V.

## OF INSURABLE INTEREST.

SECTION I. — *Of Wager Policies.*

CONTRACTS of insurance, where the insured has no interest in the subject-matter thereof, are called wager policies.<sup>1</sup> Not very long ago such policies were valid in England. Indeed gaming transactions of any kind were scarcely considered disreputable, if only they were entirely honest and neither party attempted by any fraud to gain an advantage over the other. The civil law called a certain class of contracts *aleatory*, from *alea*, a die, because these contracts were regarded as dependent upon risk or chance, like a game with dice.<sup>2</sup> In one of the classes into which these contracts were divided, one of the parties paid at once a sum of money, and the other party took upon himself a certain risk. A lottery is of this kind, where the purchaser of a ticket pays a certain sum, and the other party takes the risk of the ticket-holder, drawing a certain number. The common contract of maritime insurance

equity. Common mistake is the ordinary head of jurisdiction; and every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake."

<sup>1</sup> 1 Marshall on Insurance, Book I. 97: "An insurance, being a contract of indemnity, its object is, not to make a positive gain, but to avert a possible loss; and, as a man can never be said to be indemnified against a loss which can never happen to him, a policy without interest is no insurance, but a mere wager. It is *spei emptio* and not *aversio periculi*, which is the true idea of an insurance. A policy, therefore, made without interest, is properly denominated a wager policy, and has nothing in common with insurance but the name and form.

<sup>2</sup> This is the name given in the civil law to a mutual agreement, of which the

effects, with respect both to the advantages and losses, whether to all the parties or some of them, depend on an uncertain event. Civ. Code of La. 2951. These contracts are of the two kinds mentioned in the text, namely:

1. When one of the parties exposes himself to lose something which will be a profit to the other, in consideration of a sum of money which the latter pays for the risk. Such is the contract of insurance; the insured takes all the risk of the sea, and the assured pays a premium to the former for the risk which he runs. 2. In the second kind, each runs a risk, which is the consideration of the engagement of the other; for example, when a person buys an annuity he runs the risk of losing the consideration in case of his death soon after, but he may live so as to receive three times the amount of the price he paid for it.

has been thought to be of this kind. The other kind is where each party takes upon himself a risk, as where in life insurance the insured agrees to pay, every year, so much money; thus taking on himself the risk that the aggregate amount of his payments may be more or less than the amount receivable from the policy; while the insurer takes upon himself the risks of receiving more or less, and paying sooner or later, according to the length of life of the assured. Mr. Christian, in his notes to Blackstone's Commentaries, considers that every contract of insurance is only a wager; because if the insured pays a premium of five per cent on the property insured, the insurer in fact bets with him ninety-five to five that the ship will return in safety.<sup>1</sup>

It is obvious, however, that an important distinction exists between wager policies or policies without interest on the part of the insured, and those where he has an interest, and is to be indemnified for the loss of it by the insurers. And wager policies are no longer valid in England or in this country.<sup>2</sup> The reason is undoubtedly the same with that which has made it illegal in many states for a man to make a contract to sell stocks or property of any kind which he does not own or expect to own. And this reason is founded on a clearer perception than once prevailed of the pernicious effect of gambling in all its forms, and under any disguise, not only upon the mind and character of the gambler, but upon the public prosperity.

Thus, it has been said, that wagers on the arrival of the ship are against public policy, because they give the party insured an interest in the destruction of the ship, and make its safety adverse to his interest.<sup>3</sup> And as foreigners are always permitted to insure

<sup>1</sup> Insurance is in effect nothing more than a wager, for the underwriter who insures at five per cent receives five pounds to return one hundred upon the contingency of a certain event; and it is precisely the same in its consequences as if he had betted a wager of ninety-five pounds to five that a ship arrives safe, or that a certain event does not happen. 2 Blackstone's Com. (Christian's ed.) 459, note a.

<sup>2</sup> Prohibited by Stat. 19, Geo. II. c. 37. See also *Aberfold v. Beard*, 2 Durnford & E. 610, in which the limitation of

this statute is expressly stated. See also 3 T. R. 704, *Good v. Elliott*.

<sup>3</sup> Emerigon on Insurance, c. 1, § 1. "C'est parce qu'on a considéré que la navigation intéressant la République, il seroit odieux qu'on se mût dans le cas de desirer la perte d'un Vaisseau. L'avidité du gain est capable de produire des perfidies qu'il importe de prévenir. Voilà pourquoi dans la plupart des Places de Commerce les Assurances par gageure ont été prohibées."

or to be insured, if wager policies were permitted, they might create in some foreign state a class of persons who would make large profits on the loss of the maritime property of the state in which the policies were made. In this way the motives which lead to fraudulent losses would be greatly strengthened. Even now, most of our companies which insure against fire are prohibited by law from insuring more than a certain portion of the value of the property insured. And care is taken generally in marine insurances to guard against over-insurance. Fraudulent losses, however, still occur, and they would undoubtedly be far more frequent if policies were permitted where the insured had no interest whatever, or in other words if wager policies were legal.

That some reference to these dangers of fraud, both by foreigners or by home parties, entered into the reasons which induced the British Parliament to prohibit policies without interest by the act of the 19 Geo. II., c. 37, is certain, from the preamble of the act. For in reciting the mischiefs which insurances without interest had been found by experience to cause, the first specification is the "fraudulent loss, destruction, or capture of great numbers of ships with their cargoes."<sup>1</sup>

Nevertheless, the first section of that act in its terms confined the prohibitions of gaming or wager policies to "any ship or ships belonging to his Majesty or any of his subjects, or any goods or effects laden on board such ships." And the question soon arose, whether policies made in England on foreign ships, or goods on foreign ships, were not legal. The adjudication on this subject is peculiar, and perhaps obscure. In the earlier cases it was quite

<sup>1</sup> The whole preamble reads thus: "Whereas it hath been found by experience that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have been either fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenues as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted; and that which was intended for the encouragement of trade and navigation has, in many instances, become hurtful of and destructive to the same."

clearly held that such policies were legal and available at common law, but in a later case it was held that a policy which does not expressly contain words declaring the insured to be without interest, must be taken to be a policy without interest, and in an action upon it interest must be averred in the declaration, and proved in the trial.<sup>1</sup> But it does not appear from this decision

<sup>1</sup> *Thelluson v. Fletcher*, Douglas, 315. The policy was on goods on board three French vessels, the material part of it being in these words: "On all goods loaded or to be loaded on board the ships *Le Soigneux*, *La Pucelle*, and *Le Vanqueur*, all or any of them; the said goods and merchandise by agreement are and shall be valued at ——— on 25 casks of clayed sugar, and 12 hogsheads of Muscovados. The policy to be deemed sufficient proof of interest in case of loss." It was contended by defendant, that under 19 Geo. II. c. 37, it must be shown that some sugars belonging to the insured had been shipped. On the part of the plaintiff, it was argued that this was not a case within the statute, in which opinion the court concurred. *Buller*, J., said: "This was not a policy within the statute, foreign ships not having been included in that act." See also 1 Arnould on Ins. 279. As to validity of wager policies at common law, see also 10 Mod. 77; Comyns, Rep. 360; 2 Stra. 1250. It was held in *Craufurd v. Hunter*, 8 T. R. 13, that insurance on foreign ships, though the insurer had no interest, was good; and in an action on a policy, it was no defect in the declaration that it contained no count averring interest. This decision was affirmed by a majority of the judges, in *Lucena v. Craufurd*, 2 B. & P. 98, which decision was overruled in the House of Lords, 2 B. & P. 269. In this case Lord *Eldon* remarks: "Since the 19 Geo. II., it is clear that the insured must have an interest, whatever

we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property, which, in either case, may be lost upon some contingency affecting the possession or enjoyment of the party. . . . I do not wish that certain decisions which have taken place since the 19 Geo. II. should be now disturbed; but considering the caution with which the legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found to be upon closer investigation. Lord Kenyon, in *Craufurd v. Hunter*, considered the 19 Geo. II. as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertain doubts on that subject. Lord Chief Baron Comyns, in the case of *Depaba v. Ludlow*, Com. 360, speaking of this statute, says, that it was an act to affect the form of the policy; and Lord Hard-

that if policies are affected on foreign ships, which appear on the face of them to be wager policies, they are valid and recoverable in England. The courts use very strong language against policies without interest. Mansfield, Chief Justice, said: "Wager policies at last came to be legal, nobody knows how, contrary to common sense."<sup>1</sup> And Chief Justice Best says: "The temptation to fraudulent insurances is very great, the object to be attained by them is easily accomplished. The consequences to that most valuable class of men, underwriters, are ruinous, and to seamen whose lives are often put in hazard by such insurances, dreadful."<sup>2</sup> And in the case in which he used this language the court construed the words of the prohibiting statute widely against such policies. One difference should be especially noticed between the English law on this subject and our own. The statute of George II., above referred to, prohibits insurance, "interest or no interest, or without further proof of interest in the policy, or without benefit of salvage to the insurer,"<sup>3</sup> and declares that every such insurance shall be

wicke has said the same in two cases, — *The Sadlers' Company v. Badcock*, 2 Atk. 554, and *Pringle v. Hartley*, 3 Atk. 195. In the latter of which he distinctly says, that the words "interest or no interest" were meant only to dispense with the proof of interest on the trial. If then a policy with the words "interest or no interest" were stated in a declaration, and those words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part, and an admission on the other, that there was an interest. In *Cousins v. Nantes*, 3 Taunt. 512, *Mansfield*, C. J., says: "With respect to the true nature of the contract of indemnity, it has been argued, that if there be no interest no loss can happen; every word in the policy shows that it was an instrument to protect merchants; the words at the beginning of the declaration are 'according to the usage and custom of merchants'; it is not the usage and custom of merchants to gamble. If this

be so, every policy must be taken to be on interest, unless something be stated showing the contrary. In this policy there is nothing showing that it was not on interest. If it be admitted, as it is, that interest must be proved at the trial, it must be alleged, also, that the defendant may be prepared at the trial to meet it. This policy must be taken to be on interest; to support an action on a wagering policy, something must appear to show that it is such. Upon such a policy, therefore, we are of opinion, according to the practice of sixty years since the statute, that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is and in whom it is; for it is very necessary that the plaintiff should know what interest is intended to be relied on, because he may, by disproving it, in many cases defeat the action."

<sup>1</sup> *Cousins v. Nantes*, 3 Taunt. 513.

<sup>2</sup> *Murphy v. Bell*, 4 Bing. 567.

<sup>3</sup> Stat. 19 Geo. II. c. 37, § 1.



void. Hence the policies containing this language cannot be helped by averment or proof of interest in the insured. In this country, however, no such language in a policy defeats the insurance if interest be averred and proved.<sup>1</sup> Wager policies are expressly prohibited in some of our States, and are considered illegal in others as against the policy of our laws.<sup>2</sup>

<sup>1</sup> *Amory v. Gilman*, 2 Mass. 1. This was an action on a policy of insurance wherein the plaintiff "for whom it may concern" caused himself to be insured on the cargo of the ship *America*, at and from Teneriffe to Vera Cruz, &c. On the policy this memorandum was indorsed: "The sum insured on cargo by this policy is warranted by the assured free of average, the insurer relinquishing the benefit of salvage; and the parties agree that for so much as is insured on cargo, the policy shall be deemed sufficient proof of interest, and no part of the premium on the same to be returned for want of interest." The vessel sailed under Spanish papers and colors, and the whole expedition was understood to be a covered transaction, and in contravention of the commercial regulations of the Spanish government. The cargo was landed at Vera Cruz, and afterwards seized by the governor there. It appeared that the plaintiff was interested in the freight-money, and had really sustained a loss by the capture, to a greater amount than the sum underwritten by the defendant. *Parker, J.*: "The counsel for the plaintiff have endeavored to show that this is a wagering policy, and that as such it is valid, and ought to be carried into effect by the laws of this country. As to the second point, namely, whether a mere wagering policy without interest can be supported here conformably to the general character of our laws and to the principles of our government, I apprehend we need not now determine that

question. Though considering the great reluctance with which that doctrine was established as the common law by the courts of England, and the immediate interference of Parliament to nullify such policies upon the doctrine's being so established, we may well be justified in doubts whether in this country, where the subject is in a great measure *res integra*, such contracts could be supported, especially when the temper of our legislature respecting every species of gambling can be so well understood by recurrence to various statutes upon that subject." See also 3 Cairnes, 141, 1 Sumner, 468.

<sup>2</sup> In *Mount v. Waite*, 7 Johns. 434, which was an action on a wager policy. *Kent, C. J.*, is very clear in his declaration. He says: "A wager contract is void if it be against the principles of public policy, equally as if it contravened a positive law." Since that time wager policies have been expressly prohibited in N. Y. Rev. St. c. 20, Title 8, art. 3, § 9. See also *Jones v. Randall*, Cowp. 37, where it is held: "Action lies to recover money won upon a wager, unless the motive be fraud or other *turpis causa*. Contracts not prohibited by positive law, nor adjudged illegal by precedent, may nevertheless be void as against principles." See also *Jones v. Randall*, Lofft, 384; *Carter v. Boehm*, 3 Burr. 1905; *Da Costa v. Jones*, Cowper, 729 - 737. The principles stated in these English cases are fully indorsed in American decisions as in *Amory v. Gilman*, *supra*, where



The distinction as applied to a policy of insurance is this, that if any person having no interest in ship or cargo pays to another a sum of money and is to be repaid much more if the ship be lost, this is simply gambling, and can do no good to anybody. But if he owns the ship or cargo, and wishes to divide any loss which may occur with others, and, that he may do so, is willing to divide with them a proportionate part of the earnings or profits he will make if the ship be not lost, this transaction is useful to both parties and to the community.

The question then occurs, What is the interest in the property which is the subject-matter of the insurance, which shall make the contract valid? We think the best definition to be, any such interest as shall make the loss of that property a pecuniary damage to the insured.<sup>1</sup>

Mr. Chief Justice *Dana* says: "As wager policies are injurious to the morals of the citizens, tend to encourage an extravagant and peculiarly hazardous species of gaming, and to expose their property, which ought to be reserved for the benefit of real commerce, they ought not to receive the countenance of this court." *Parker*, C. J., says in *Lord v. Dall*, 12 Mass. 120: "A wager policy, we think, would be contrary to the general policy of our laws, and therefore void." In New Hampshire it has been held that "all wagers, upon matters in which the parties have no interest, are void contracts." *Hoit v. Hodge*, 6 N. H. 104. See also *Perkins v. Eaton*, 3 N. H. 152; *Collamer v. Day*, 2 Vermont, 144. In Pennsylvania Mr. Chief Justice *Shippen* says, in *Pritchett v. Ins. Co. of N. America*, 3 Yeates, 464: "A policy made without interest is a wager policy, and has nothing in common with insurance, but name and form. 1 Marsh. 30, 97. It is not subservient to the true interests of fair trade and commerce, but is pregnant with as much mischief, both public and private, as can proceed from any species of gaming which the legislature has

hitherto found it necessary to repress. Every species of gaming contract, wherein the insured having no interest, or a colorable one merely, or having a small interest, much overvalues it in a valued policy, under the cloak of insurances, are reprobated both by our law and usage." See also 3 Kent's Com. 277, 278, and cases cited.

<sup>1</sup> Mr. Justice *Lawrence*, in *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 269, uses this language: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who, in consequence of such events, may have intercepted from them the

The most common form of this is the direct interest of absolute ownership. But it is certain that the insured need not be an owner, if he be so circumstanced with respect to the property that he will derive some pecuniary benefit from the safety of the thing or its continued existence, and some injury from its destruction. The very word "interest" seems to carry with it, by its own force, the idea of some relation to, or some concern in, the subject-matter of the insurance. But this interest must be pecuniary, involving on the one hand pecuniary benefit, and on the other pecuniary loss.<sup>1</sup> A father may *feel* the greatest interest in an important adventure of his son ; but this interest is not that which the law of insurance requires ; for it is not enough that he should be afflicted by the loss of the property, but he must be in some way the poorer for it. "An insurable interest," says Mr. Justice Story, "is *sui generis* and peculiar in its texture and operation."<sup>2</sup> We believe, however, that any interest whatever which comes under the above definition or description is sufficient to sustain a policy.

advantage or profit which but for such events they would acquire according to the ordinary and probable course of things. . . . Interest does not necessarily imply a right to the whole, or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may be very different ; of the first the price is generally

the measure, but by interest in a thing every benefit and advantage arising out of, or depending on, such thing is being comprehended." Emerigon des Assurances, 203, c. 8, § 3, states a case where relatives of a person ransomed from slavery were considered to have an insurable interest in his safe return home. *Duffell v. Wilson*, 1 Campb. 401 ; *Sterling v. Vaughan*, 11 East, 619.

<sup>1</sup> See opinion of Mr. Justice Lawrence in *Lucena v. Craufurd*, *supra*. 1 Phil. Ins. 174 ; *Warder v. Horton*, 4 Bin. 529 ; *The Aurora*, 4 Ch. Rob. 218.

<sup>2</sup> *Hancox v. Fishing Ins. Co.*, 3 Sum. 140. The language is : "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable." See *Lucena v. Craufurd*, 2 Bos. & Pull. 294, *infra*.

Thus, it is certain, that it need not be a vested interest in possession. A mere expectancy is sufficient;<sup>1</sup> provided, however, and this is essential, that it be connected with that thing concerning which the expectancy exists, either by an existing title to the thing, or by a definite and obligatory contract, the execution of which will give title. Thus, if a ship-owner expects to earn a large sum by carrying goods from one port to another, his interest in the freight is not insurable, unless at the time of the loss either the goods are on board so that he has a lien on them to carry them to their destination and so earn his freight, or he has made a definite contract that certain goods shall be put on board, so that he must earn his freight unless a loss intervenes and prevents him.

Inchoate rights unquestionably may suffice to give an insurable interest, provided those rights are founded on positive and subsisting contracts.<sup>2</sup> As good examples of these may be mentioned

<sup>1</sup> See *Lucena v. Craufurd*, *supra*.

<sup>2</sup> *Lucena v. Craufurd*, 2 Bos. & Pull. 294. In the opinion of the majority of the judges, this language is used: "Inchoate rights founded on subsisting titles, unless prohibited by positive laws, are insurable. Freight, respondentia, and bottomry are of this description; the profit is prospective, but they are founded on existing charter-parties, bonds, and agreements. Wages of seamen are in their nature insurable, though universally prohibited to be insured on principles of policy. . . . The ancient definitions of insurance do not exclude contingent interest. The definition in Valin, article 1mo. fo. 26, is: 'Assecratio est conventio de rebus tuto aliunde transferendis pro certo præmio, seu est aversio periculi.' In Loccen. lib. 2, c. 5, note: 'Aversio periculi, ita dicta quod alterius periculum in mari aversum it; aut in se recipit.' In Roccus: 'Assecratio est contractus quo quis alienæ rei periculum in se suscipit obligando si sub certo pretio ad eam compensandam si illa perierit. Ideo valet pactum ut si merces salvæ venierint in portum

solvatur certa summa si vero illæ perierint teneatur assecrator solvere damnum, vel æstimationem istarum mercium.' These definitions clearly embrace a contingent interest, which is subject to the perils of the sea, and for the loss of which a compensation may be made. All that these definitions require is that the insured shall be interested in the arrival of the thing insured and the event of the voyage, at the time of effecting the policy and at the time of loss. Nor is it any objection to this insurance that other persons might have insured to the full value. Where a ship and cargo are insured to the full value, and money lent on bottomry or respondentia, the lender may insure, as well as the owner of the ship or cargo. It has been expressly decided that a creditor may insure the life of his debtor; for, though he has no right depending upon the life of his debtor, he might be essentially injured by his death." And Arnould, 1 Ins. 230, says: "A vested interest in possession is not necessary to give the right of insuring. An expectancy, coupled with a present exist-

lenders of money on respondenture and bottomry, who in the one case lose their debt if the goods be lost, and in the other if the ship be lost. It may be well, however, to consider the various subjects of this chapter more specifically.

## SECTION II. — *Insurable Interest in the Ship.*

If the owner of a ship mortgages it to secure a debt, he has still an insurable interest in the ship.<sup>1</sup> For he may look upon it as the means by which he shall pay the debt, and when he pays the debt the ship becomes again wholly his own.

ing title to that out of which the expectancy arises, is an insurable interest. Inchoate rights founded on titles subsisting at the time of loss are insurable interests. Thus, freight, payable either on the arrival of the goods, or under a charter-party, is insurable by the ship-owner, provided his title to the freight has accrued at the time of loss, so that nothing but the intervention of the loss can prevent him from earning it. Thus, again, profits expected to arise out of the sale or disposal of the goods on their arrival are insurable by the owner of the goods, provided the goods are on board at the time of the loss, and it can be shown that, but for the loss, a profit would be made on them. So, again, respondentia and bottomry loans are insurable by the lender whenever the instrument of hypothecation makes the recovery of his money depend on the risk of the voyage. In fact, every kind of interest that may subsist in, and be dependent upon, things exposed to the dangers to which mercantile adventures are subjected, may be protected by a policy of insurance effected on account and for the benefit of those who are so far interested in the things thus exposed to sea risks as to have a benefit from their preservation, damage from their destruction." See

also *Hancox v. Fishing Ins. Co.*, 3 Sum. 140, *supra*.

<sup>1</sup> *Smith v. Lacelles*, 27 R. 187, in which the rights of mortgagor and mortgagee are stated impliedly. See also *Traders' Ins. Co. v. Roberts*, 9 Wend. 474; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495. In the opinion in this case Mr. Justice Story says: "No doubt can exist that the mortgagor and mortgagee may each separately insure his own distinct interest in the property. . . . Where an insurance is made by the mortgagor on the premises on his own account, notwithstanding any mortgage or other encumbrance upon the premises, he will be entitled to recover the full amount of his loss, not exceeding the insurance, since the whole loss is his own, and he remains personally liable to the mortgagee or other encumbrancer for the full amount of the debt or encumbrance." *Stetson v. Mass. Mutual Fire Ins. Co.*, 4 Mass. 330; *Strong v. Manuf. Ins. Co.*, 10 Pick. 40; *Higginson v. Dall*, 13 Mass. 99; *Williams, Adm. v. The Cincinnati Ins. Co.*, Wright (Ohio), 542; *Alston v. Campbell*, 4 Brown, P. C. 476; *Hibbert v. Center*, 1 T. R. 745; *Locke v. N. A. Ins. Co.*, 13 Mass. 41; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81.

But the mortgagee has also an insurable interest.<sup>1</sup> His title is defeasible by a payment of the debt; and the credit of the mortgagor is pledged to him for the debt independently of the ship. Nevertheless, the ship is in his hands as security, and he has a right to make this security still more secure by insuring it. Therefore both the mortgagor and the mortgagee have an insurable interest in the ship.

So too the ship-owner has an insurable interest in the ship, although he has let out the whole of the ship to a charterer.<sup>2</sup> And the charterer also has an insurable interest in the ship.<sup>3</sup> So

<sup>1</sup> *Irving v. Richardson*, 2 Barn. & Ad. 498. In this case *Parke, J.*, remarks: "The mortgagee of a ship has a distinct interest from that of the mortgagor to the extent *prima facie* of the value mortgaged." See also *S. C. 1 Moody & Rob. 153*; *Traders' Ins. Co. v. Roberts*, 9 Wend. 404; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. S. C. R. 495.

<sup>2</sup> *Hobbs v. Hannum*, 3 Camp. 93; Opinion of *Eyre, C. J.*, in *Curling v. Long*, 1 Bos. & Pull. 636.

<sup>3</sup> *Robbins v. New York Ins. Co.*, 1 Hall, S. C. 325. This was an action upon a policy of insurance for \$1,000, made by the defendants in favor of the plaintiff, upon the freight of all kinds of goods, &c., laden or to be laden on board the schooner, &c., at and from New York to Wilmington, N. C., thence, &c., and back to New York. Declaration contained special count on the policy, together with common counts for money. Plea, the general issue. It appearing on the trial that the plaintiff's interest was that of assignee of a charter-party, a non-suit was ordered, and on motion to set this aside the point was raised that the evidence exhibited an insurable interest in the plaintiff, for as charterer he was to advance part of the hire of the vessel. A part of the freight had been advanced in New York. *Jones, C. J.*, in delivering the opinion of

the court, said: "The advance of the freight gives no right to insure beyond the amount of the advance; and where the owner of the vessel is liable to refund in case of loss, his right to insure that amount—resulting from the lien the charterer has upon the freight for his security—requires that proof should be made of the actual payment of the money alleged to be advanced. In most cases the charterer will have a lien upon the freight for the advances he makes the ship-owners, as his security against their inability to refund. That lien gives him an interest under the charter-party as or in the nature of a mortgage, which he may insure; and the better opinion seems to be, that he may insure it in general terms under the name of freight, without describing it as a mortgage interest. But to enable him to recover, he must prove the fact of the advance." In *Sansom v. Ball*, 4 Dallas, 459, in which case the plaintiff, having purchased the right to fill up three eighths of a ship, and paid the price, insured his interest under the general name of "freight advanced"; on the question whether this interest was insurable or not, *Tilghman, C. J.*, said: "On this point, whether it is considered on principle, or on usage, I have no doubt the law is with the plaintiff." And see *Oliver v. Greene*, 3 Mass. 133.

one who has contracted to purchase a ship has an insurable interest, and will recover, if before the loss occurs the title is absolutely in him, or if by the terms of the sale the ship is then at his risk.<sup>1</sup> But we shall consider more fully the insurable interests of the mortgagor and mortgagee, of the ship-owner and charterer, and of the buyer and seller of the ship, as separate topics.

### SECTION III. — *Insurable Interest in Freight.*

IN maritime law the word "freight" sometimes means the cargo on board, and sometimes the money earned in the ship by carrying the cargo. These two meanings are both ancient.<sup>2</sup> In law the word is very much restricted to the latter meaning, especially in the general law of shipping. It has however a somewhat wider significance as it is used in policies and in the law of insurance; and a very good definition of it in this sense is given by Lord Tenterden.<sup>3</sup> It is "the benefit derived by the ship-owner from the employment of his ship." This definition includes first that which is strictly freight, or the price which the shipper of the goods pays to the ship-owner for carrying his goods; and as freight

<sup>1</sup> *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Warder v. Horton*, 4 Binney, 529.

<sup>2</sup> The word "freight" is defined by Beawes (*Lex Mercatoria*, 118) as "the sum agreed upon for hire of a ship, entirely or in part, for the sale of goods." This is now the usual meaning of this word in law. In common conversation, however, it often means also the goods carried. And that this was, if not its original meaning, one of its early meanings, is certain from the case of *Bright v. Cowper* (1620, 1 Brownl. & G. 21), the report of which begins: "Action of covenant, brought upon a covenant made by the merchant with the master of a ship, that if he would bring his freight to such a port he would pay him such a sum." Now, however, it means the sum to be paid for such carriage, and also the sum which might

be payable therefor. For, if a ship-owner carries his own goods only, he may insure his freight *eo nomine*, meaning what another would have paid him for carriage of the same goods on the same voyage; or he may include it in a valuation of his ship or of his cargo. See *Robinson v. Manufacturers' Ins. Co.*, 1 Met. 143-145; *Adams v. Penn. Ins. Co.*, 1 Rawle 87, 106; *Flint v. Flemyng*, 1 B. & Ad. 45; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Clark v. Ocean Ins. Co.*, 16 Pick. 289; *Allen v. Mackay*, 16 Law Reporter, 1861; *Hosmer, J.*, in *Riley v. Hartford Ins. Co.*, 2 Conn. 373; 1 Phillips on Ins. 185, § 11; *Giles v. Brig Cynthia*, 1 Pet. Adm. 206, *Blakey v. Dixon*, 2 B. & P. 321; *Scott v. Libby*, 2 Johns. 336, S. C. 4 Dall, 439.

<sup>3</sup> *Flint v. Flemyng*, 1 B. & Ad. 48.



is only earned when the ship arrives, this freight is lost if the ship be lost, and then the definition above stated includes the price which a charterer or hirer of the ship agrees to pay for the use of her, whether for a certain time or for a certain voyage. These two kinds of freight are more expressly included in another and fuller definition given by Lord Ellenborough. "It is either the remuneration to be paid to the ship-owner for the hire of his ship, under an express contract of affreightment for a certain voyage, or the price to be paid to him for [the carriage of] goods, irrespective of such contract."<sup>1</sup>

We think the first of these definitions by Lord Tenterden the better, for it is certain that freight in insurance law includes something more than the two kinds of freight mentioned by Lord Ellenborough. It may be used in an insurance policy to mean the benefit and advantage which the ship-owner who carries his own goods in his own ship expects to derive from the increase of their value when they reach their port of destination.<sup>2</sup> In either of these three senses it is perfectly well established that expected freight is, in England and in this country, an insurable interest. The question then occurs, When is this interest possessed?

In the first place, then, the insured must be in some way or to some extent an owner of the ship, because it is only an owner of the ship who is entitled to freight.<sup>3</sup> But his title, to give him a

<sup>1</sup> *Forbes v. Aspinall*, 13 East, 324.

<sup>2</sup> In *Flint v. Flemyng*, 1 B. & Ad. 48, Lord Tenterden says: "If it be a necessary ingredient in the composition of freight that there should be a money compensation paid by one person to another, the benefit accruing to a ship-owner from using his own ship to carry his own goods is not freight. But if the term 'freight,' as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the ship-owner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from

persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy. Before the statute of 19 Geo. II. c. 37, it was not necessary to prove any interest in the subject-matter of insurance. Since that statute, it would be as good a proof of interest in freight, to show that the owner of a ship was conveying his own goods in his own ship, as that he was conveying the goods of others." See also *Devaux v. J'Anson*, 5 Bing. N. C. 519, and note 2 on preceding page.

<sup>3</sup> In *Camden v. Anderson*, 5 Term. Rep. 709, Lord Kenyon says: "The right to freight results from the right of



sufficient interest in the freight, may be either legal or equitable.<sup>1</sup> For if the mortgagor looks to the freight his ship will earn as helping him to pay his debt, the mortgagee may look to it as additional security for his debt.

In the next place the insured must have, as has been already intimated, at the least, an inchoate right to the freight; that is, he must have such a relation to it, that he would have earned it, if the loss had not intervened and prevented.

If in a policy the owner of the ship is insured for freight on his own goods, he must either have purchased those goods, or have made a definite contract for certain goods, with intent to put them on board his ship.<sup>2</sup> Nor can he recover unless his intention to put those specific goods on board his ship was defeated by a loss against which he was insured.<sup>3</sup> Suppose, for example, that he is in New York, and his ship is in Canton; all that he knows about it is, that he has sent orders to his agent in Canton to purchase for him a cargo of teas, and put them on board his ship, and the ship and the freight are insured against perils of the sea, either on time, or in that port; and by such a peril the vessel is lost in that port with nothing on board: can he recover on his insurance on freight? Certainly not on the mere fact that he had given such orders, and that the agent had funds and would have made the purchase. Nor

ownership, and, if the plaintiffs have no title to the ship, they have no interest in the freight." And *Ashhurst*, J., in the same case, speaks of the action to recover freight as that "which can only be maintained in consequence of ownership." See also *S. C. 6 Term. Rep. 723*, *1 Bos. & Pull. 272*; *Marsh v. Robinson*, *4 Espinasse*, 98.

<sup>1</sup> See note 1. p. 164, and cases there cited.

<sup>2</sup> *Curling v. Long*, *1 Bos. & Pull. 634*. "If the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that freight is insurable, and recoverable." Dictum of *Eyre*, C. J. See also *Montgomery v. Egginton*, *3 T. Rep. 362*. "The assured upon a valued policy on freight is entitled to recover the whole

amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped." *Devaux v. J'Anson*, *5 Bing. N. C. 519*; *Forbes v. Aspinall*, *13 East*, 323; *Truscott v. Christie*, *2 Brod. & Bing. 326*; *Flint v. Flemyng*, *1 B. & Ad. 45*; *Parke v. Hebson*, *2 Brod. & Bing. 329*; *Adams v. The Penn. Ins. Co.*, *1 Rawle*, 97.

<sup>3</sup> *Flint v. Flemyng*, *1 B. & Ad. 45*, in which Lord *Tenterden* says: "To recover upon a policy on freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was some contract for doing so."

yet if the agent had gone further, and entered into a negotiation for the purchase, nor even if the terms on which the purchase should be made were agreed to; but he would recover if the purchase had been made in fact, and the goods had become his own, so that if they were lost the loss would be his. For he has his ship there, and his goods there, and is prevented from putting his goods on board the ship carrying them, and so earning his freight.

But this question has been much more considered, and has been decided on what we suppose to be the same principles when the freight insured was to be earned by the ship-owner by carrying the goods of other parties.

Here it is enough, if the owner of the ship through his master has entered into a definite contract with the owner of certain goods that they shall be put on board his ship for carriage. The definitions of this inchoate right to the earning of freight sometimes include the requirement that the goods should be ready to be put on board; we doubt however the necessity of this phrase. If the vessel is in port, and the goods are there also, and would be put on board at once but for the loss, there is no doubt that the ship has an insurable interest in the freight of them.<sup>1</sup> But if the goods are some of them at a distance, and some time must elapse before they can reach the port, or if they are in port, but need that something should be done to them before they are in a condition to go on board, we should say that the ship has still an insurable interest on the freight of them, although in one sense certainly they cannot be said to be ready to go on board.

It has been distinctly held that if a vessel begins a voyage, even in ballast, to a port to which she is to take a cargo of freight under a contract, the voyage is begun on which freight is to be earned, and if the vessel is lost before arriving at the port in which she will find the cargo, it is a loss on freight.<sup>2</sup> The limitation on this

<sup>1</sup> *Montgomery v. Egginton*, 3 Term Rep. 362, *ante*, p. 168, n. 2.

<sup>2</sup> *Adams v. Warren Ins. Co.*, 22 Pick. 163. "It appears," says *Shaw*, C. J., "that the assured had a contract of charter-party to carry a cargo of live-oak from St. John's River, East Florida, to Charlestown, Mass.; that a cargo was there ready to be taken on board

on the arrival of the vessel; and that the vessel sailed from New York in the execution of the contract, and was lost on the voyage. The assured had thus an inchoate right to freight, which was an insurable interest; it was lost by a peril insured against, and therefore the plaintiff has a right to recover." *Robinson v. The Manufacturers' Ins. Co.*, 1

principle being that so long as the destination of the ship, or of the voyage for which the freight is insured, is contingent, the insurable interest in freight for that voyage does not attach.<sup>1</sup> In a lead-

Met. 143. "Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. The vessel was lost in the bay of Cadiz, after being ready to sail for Palermo in Sicily, having on board a very small quantity of goods on freight, and those shipped for her port of destination in the United States. The assured had chartered the vessel, excepting the cabin, deck, and necessary room for the accommodation of the crew (reserving to the master the privilege of freight in the cabin), from Palermo to New York for \$2,500, and \$35 per diem demurrage. Held, that the whole freight from Cadiz to Palermo, and from Palermo to the United States, was one entire subject of insurance; that the valuation was not so great as to raise a suspicion of fraud; and therefore the underwriters were not entitled to have the policy opened, but were liable for a total loss." See also *Davidson v. Willasey*, 1 M. & S. 313; *Davy v. Hallett*, 3 Cairnes, 19; *Clark v. Ocean Ins. Co.*, 16 Pick. 289; *Horncastle v. Stuart*, 7 East, 400.

<sup>1</sup> In *Forbes v. Aspinall*, 13 East, 328, Lord *Ellenborough* held that, where there is no contract, the assured could only recover for the freight of the goods shipped, notwithstanding it was a valued policy; and that probability or reasonable expectation furnished no ground for a recovery. Upon the same principles the case of *Patrick v. Eames*, 3 Campb. 441, was decided in 1813. *Adams v. Pennsylvania Ins. Co.*, 1 Rawle, 97. This was an action to recover on a policy of insurance to the amount

of \$4,000 on freight on the brig *Shamrock*. On the trial it appeared that the vessel was lost on the voyage from Gibraltar to Bordeaux, whither she was going, with specie on board, to purchase a cargo. It did not appear that any cargo or portion thereof had been purchased, or contract for any had been made. *Huston, J.*, in giving the opinion of the court, uses this language: "It was admitted that the owner of a vessel and cargo may insure on freight when carrying his own goods; but it is contended the policy never attached in this case. It was settled long ago that, although the goods are ready to be loaded, yet if none of them are actually on board, and the vessel is driven from her moorings and lost, there can be no recovery on an insurance on freight. 2 Stra. 1251. But it has also been settled, that if a vessel is chartered to go to T., and take in a load and carry it to B., and she is lost on the voyage to T., and never takes in any load, there can be a recovery on the policy of freight, on the ground, it would seem, that the contract to sail to T. and take in a lading and carry it to B., was one entire contract, and, having set sail, the policy attached. 6 D. & E. 478. This ship sailed under a charter-party. It would seem to have been settled since, that if the vessel sails under a contract, or, being in a port, an express contract is made to load her, and she is fitted to take in such a load, and is lost, there can be a recovery on the policy on freight. Indeed there seems to be no doubt that a recovery may be had on such policy, if the vessel is loaded, though she has not sailed; or, if she has an express contract for a load, though

ing case on this subject it was said, that "the insurance on freight will attach when the ship-owner is in such a situation, in regard to his vessel and voyage, that nothing but the intervention of one of the perils insured against can prevent him from completing his voyage and earning his freight."<sup>1</sup> We are not sure that even this language is not too stringent. It might be enough to say in the words used by Chief Justice Eyre, that the ship-owner has an insurable interest in freight when the goods "are so situated in respect to the ship as to create a well-grounded expectation of freight being realized."<sup>2</sup>

Mr. Phillips says, "the ship must be ready and something must have been done or expenses must have been incurred towards earning freight." We cannot but think that if the ship is ready, that is enough. Expenses must necessarily have been incurred to make her ready. In the only case which Mr. Phillips cites in support of this remark,<sup>3</sup> *Tonge v. Watts*, 2 Str. 1251, a ship was careened; a sudden tempest arose and she was lost. A cargo was ready to be put on board; the plaintiff was not allowed to recover his insurance on the freight. The only reason given is that, "as the goods were not actually on board so as to make the plaintiff's right to freight commence, the Chief Justice held, he could not be allowed it." This certainly would not be a sufficient reason now, and on the next page of his work Mr. Phillips states: "A contract for freight gives an insurable interest as soon as the ship is ready to take it."<sup>4</sup>

none of it is on board; or, if she has set sail for the place at which she is to load; or if, being at the place of loading, her owner has commenced fitting her to receive and carry the load contracted to be carried. The defendants say no case has gone beyond this, and the plaintiff insists that, if there is a reasonable expectation of a load at a port, and a vessel sails for that port to take it in, the policy attaches, and, if the vessel is lost by the perils insured against, the sum insured will be recovered. Most of the cases on this subject have been cited in the argument, and I have carefully examined them,

and have come to the conclusion that according to the decided cases the defendants are not liable in this case." See also *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. Rep. 341; *Riley v. Hartford Ins. Co.*, 2 Conn. 368; *Forbes v. Aspinall*, 13 East, 323; *Phillips on Ins.* 189; *Arnould on Ins.* 242.

<sup>1</sup> Per *Shaw*, C. J., in *McGaw v. Ocean Ins. Co.*, 23 Pick. 405.

<sup>2</sup> *Curling v. Long*, 1 Bos. & Pull. 636.

<sup>3</sup> 1 *Phillips on Ins.* 185, § 329.

<sup>4</sup> 1 *Phillips on Ins.*, 186, § 332, and cases cited.

It has been held that freight could not be insured for a part of the voyage,<sup>1</sup> but there is no reason whatever for this, and it is now quite well settled both by law and by practice that freight may be insured for any part of the voyage.<sup>2</sup>

Let us now see what is the law of the insurance of freight, where the ship is hired or chartered. Here the ship-owner has an insurable interest as soon as the ship has broken ground on the voyage described in the charter-party.<sup>3</sup> Or if the charter-party be on time,

<sup>1</sup> *Murdock v. Potts*, 2 Park, 399.

<sup>2</sup> *Taylor v. Wilson*, 13 East, 624. Lord *Ellenborough*, in delivering the opinion of the court, says: "The only question is, whether a freight voyage may be insured part of the way. This was a voyage to Gottenburg by way of Portsmouth, and the freight was to be earned at Gottenburg. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriter when they insured their freight from St. Ubes to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was insurance on freight in that voyage. There is no doubt that a party may insure his ship and goods during part of a voyage; and I cannot see why he may not also insure freight in the same manner. There is no case which intimates to the contrary, except *Murdock v. Potts* at nisi prius, which was never brought before the court, and is inconsistent with all other cases. Except that opinion, there is nothing to distinguish an insurance on freight in this respect from an insurance on ships or goods for a part of the voyage. There is no foundation for saying that a voyage is not divisible as a subject of insurance." See also *Violett v. Allnutt*, 3 Taunt. 419; *Leathely v. Hunter*, 7 Bing. 529; *Barclay v. Stirling*, 5 Maule & S. 6.

<sup>3</sup> *Hobbs v. Hannum*, 3 Campb. 93.

Action upon a policy of insurance on the ship *Jane*. The ship was the property of the plaintiff, and was chartered by him to one W., who covenanted by the charter-party that, in case the ship was lost, he should pay the plaintiff £3,600, her full value. The ship, having smuggled goods on board, was seized and condemned at Buenos Ayres. It was argued, that, as the plaintiff had a right to recover the full value from W. by the terms of the charter-party, he had no insurable interest to support the action on the policy. Lord *Ellenborough* held that he was not bound to trust exclusively to the credit of the charterer, but might likewise protect himself by a policy of insurance. This would be a double insurance, if the covenant of the charterer should be considered, as it certainly might, an insurance. If it were so, this would constitute no objection under the English rule. In this country if it were regarded as a double insurance, the insurable interest of the owner would only be the excess of the value of the ship over the amount to be paid by the charterer in case of loss. But some question might arise whether it came within the rule which considers double insurance only an insurance by two or more insurers of the same insured against the same risks. The answer to this question must depend upon the terms of the covenant on the one hand, and of the policy on the other.

then from the moment that that time begins, provided the ship be then ready to discharge all the duties and obligations imposed upon her by the charter-party. The reason of this is the same with that we have considered as determining the question in reference to freight by shippers.<sup>1</sup> The ship-owner has made a contract, the execution of which will give him freight, and his ship is in a condition to execute this contract. If now it be prevented from doing so by one of the perils against which the owner is insured, he has lost his freight by that peril, and may recover for that loss. The charterer himself may hire the ship on such terms as permit him so to use the ship as to acquire himself an insurable interest in the freight. If for a certain sum he hires the whole ship or any definite part of the tonnage without any specification that he hires it to carry only his own goods, he has a right to transport other people's goods on freight. This is the same right the hirer of a house has to underlet it, when he has not bargained otherwise; and, if he in fact undertakes to carry the goods of other persons, he stands, as to his insurable interest in the freight he has to receive, precisely as the ship-owner stands who contracts to carry the goods of shippers.<sup>2</sup> Mr. Arnould, who says this, adds: "At all events, by the surplus which such freight exceeds the sum he has engaged to pay the ship-owner as charter-money."<sup>3</sup>

We see no sufficient reason for this limitation. If the charterer intends to carry his own goods, and does so in fact, he does so for the purpose of making a profit on them by increasing their value by the transportation. We do not know why the charterer does not stand in the same condition with the ship-owner. And as the

<sup>1</sup> See notes 32 and 33, *supra*, and cases cited.

<sup>2</sup> See *Oliver v. Greene*, 3 Mass. Rep. 138, *supra*; *Hobbs v. Hannum*, 3 Campb. 93; *Taylor v. Wilson*, 15 East, 324. The case of *Mellen v. National Ins. Co.*, 1 Hall, S. C. Rep. (N. Y.) 452, was decided adversely to the law as stated in the text. Plaintiffs were charterers, and had taken freight for others, and the vessel was lost. It was contended that they had insurable interest, and the court so held, saying: "The charterer has no interest at risk, which he

is to protect by insurance; his liability to pay the charter-money depending on the safe arrival of the ship. But the chartered vessel may be underlet. In that case the loss of the voyage would produce no loss to the charterer, unless the freight payable by others to him, on the safe arrival of the goods, exceeds the amount of the charter-money which would be payable on safe arrival." We consider this case decidedly opposed to the weight of authority.

<sup>3</sup> 1 Arnould on Ins. 259.



ship-owner has an insurable interest in the freight of his own goods, which he may insure under that name, the charterer should have an insurable interest in the carriage of his own goods, and may insure it simply as freight. It has been held otherwise;<sup>1</sup> but we agree with Mr. Phillips in thinking that the reasons for those decisions are unsatisfactory, and that the weight of authority is against them. We believe the charterer may insure his interest in the freight, under the word "freight," and that the owner may also insure his interest in the freight by the same description.<sup>2</sup>

So also a part owner who charters the whole vessel can insure the whole of the freight, without specifying what his interest is.<sup>3</sup>

<sup>1</sup> See *Mellen v. National Ins. Co.*, 1 Hall, N. Y. S. C. Rep. 452; and Mr. Phillips's remarks on the same, 1 Phillips on Ins. § 480.

<sup>2</sup> *Clark v. Ocean Ins. Co.*, 16 Pick. 289. "The plaintiff chartered a ship for a voyage from Robbinstown, Maine, to Trinidad de Cuba, and back to the United States, for which he was to pay the owner \$750 at Trinidad, and \$750 on her return. A cargo was put on board at Robbinstown by a stranger, the freight of which, amounting to \$1,003, was to be paid to the plaintiff at Trinidad. The plaintiff effected insurance of \$1,000 on freight on board the ship at and from Robbinstown to Trinidad, and at and from thence to the United States, and \$500 on freight at and from Trinidad to the United States, the freight being valued at \$1,500. The ship was lost on her outward passage, so that nothing became due from the plaintiff to the owner. It was held that the plaintiff had an insurable interest; that it was protected by the terms of the policy; and that, if the valuation was fairly made by the parties with a full knowledge of the material facts, the plaintiff was entitled to recover \$1,000, pursuant to the valuation, but if the valuation was evasive and a cover for a wager, it should be set aside, and the

plaintiff should recover according to his actual interest. See also *Bartlett v. Walter*, 13 Mass. 267; *Strong v. Manufacturers' Ins. Co.*, 13 Mass. 96; *Crowley v. Cohen*, 3 B. & Adol. 478; *Caruthers v. Shedden*, 6 Taunt. 14; *Sansom v. Ball*, 4 Dallas, Pa. 459.

<sup>3</sup> *Oliver v. Greene*, 3 Mass. 133. Opinion by *Parsons*, C. J.: "On the facts disclosed by the case, the court are called upon to determine what insurable interest the plaintiff had in the schooner *Hiram* when she was lost, for which he was entitled to recover on this policy. There is no question as to one moiety of the schooner, which was the absolute property of the plaintiff; the disagreement of the parties is confined to the other moiety, which he hired of Mayberry, a part owner. It appears from the facts that the plaintiff had hired of Mayberry his moiety for eighteen months; that for the time he was to pay a certain sum per month, and if the schooner was lost during the term, he was to pay Mayberry for his half-part \$1,800, which sum it is not contended was above the value of half the vessel. By virtue of this contract, the plaintiff had, immediately on its execution, a special property in Mayberry's moiety, which was at his risk during the term. The contract was fair



If the charterer insures his freight, the question may arise, how much he insures, or rather how much is payable to him in case of loss.<sup>1</sup> This question must be answered by the principle of indemnity; that is, he is to be paid for as much as he loses, and no more. This may be nothing, for if he is to pay to the owner if the vessel arrives safely as much as he can earn by the transportation of his own goods, or the same amount as he can receive from shippers whose goods he carries, then he will gain as much as he will lose by a loss of the freight; that is, he suffers no loss and has nothing to receive from the insurers. But if he is bound to pay a certain sum to the ship-owner, and will earn a larger sum either on his own goods or on the goods which he carries for others, he loses the difference, if the arrival of the goods be prevented; and this difference constitutes the insurable interest which he has in the freight.<sup>2</sup>

The question whether, at a certain period of the voyage, the insured on freight, whether owner or charterer, has an insurable interest therein, must be determined by the principle which is continually recurring throughout this topic of insurable interest. That principle is, that the insured must have at the time of the loss such an interest in goods, by carrying which the freight might be earned, that only an extraordinary peril will prevent the earning of the freight.<sup>3</sup> It must not be merely a hope, or a possi-

and legal, and the plaintiff might indemnify himself against the loss by causing himself to be insured. When the schooner was lost, he lost the whole of her; of one moiety he was the absolute owner, and of the other moiety he was the special owner, being liable to pay for her at an agreed price. We are therefore of opinion that the plaintiff is entitled to recover of the assurers the sum insured on the vessel, he being interested in her to that amount."

<sup>1</sup> It was held in *Bartlett v. Walter*, 13 Mass. 267, that if the charterer of a ship contracts to pay the owner for the ship in case of loss, he has an insurable interest in her, and may effect insurance upon her in his own name.

<sup>2</sup> *Mellen v. National Ins. Co.*, 1 Hall, S. C. Rep. (N. Y.) 452, was decided *contra*;

but we have already spoken of that case; n. 2, p. 173.

<sup>3</sup> *Livingston v. Columbian Ins. Co.*, 3 Johns. 49. The owners of a ship let her by charter-party for a voyage from B. to N., then to A., and back to B., for a certain sum for the round voyage. The ship arrived at N. in the prosecution of this voyage, and was there detained by embargo. *Kent*, C. J., said: "The risk had attached on the whole freight. The charter-party gave an entirety to the contract of freight." And it was held in *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. 346, in a case upon a policy on freight from N. to W., thence to B., where the assured had bought a cargo which would have been taken on board at W., had not the vessel been lost on her way thither, that

bility.<sup>1</sup> It however may be only an *expectancy*.<sup>2</sup> But what is

"the interest in the whole freight commenced at the time of the vessel's sailing from N."; and see *ante*, n. 3, p. 169.

<sup>1</sup> *Knox v. Wood*, 1 Camp. 542; *Stockdale v. Dunlap*, 6 Mees. & Wels. 224. In this case, a Liverpool merchant, having verbally contracted with a ship-owner to sell him a quantity of palm oil "to arrive," effected an insurance on the profits expected to arise from the sale and disposal of this palm oil on its arrival in Liverpool; in the result, the oil never did arrive in the ship, which was entirely disabled on the coast of Africa, and the merchant brought his action on the policy for a total loss. Proof was given at the trial that the term "oil to arrive per ship" was a mercantile term, and that, under such a contract as that made in the present case, if the oil did not arrive in the ship, the plaintiff had no right to it. Under these circumstances, the court held that, as there was no written contract, nor any contract at all, which the assured could have enforced in law for the sale to him of the palm oil at the time of the insurance or the loss, he consequently had no insurable interest in the profits expected to arise from its sale or disposal. It is held in *Le Cras v. Hughes*, Temp. 22 Geo. III., cited in *Park on Ins.* 568, that the captors of a prize have an insurable interest in such prize, on the ground of their having a reasonable expectation of receiving from the Crown the property captured. In a note to the report of this case, as found in 3 Doug. 87, the following language is used: "The authority of this case was fully recognized by seven of the judges in the case of *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 294. The case of *Le Cras v. Hughes* was a case

of mere expectation, and the circumstances were not near so strong in favor of the accused as the circumstances in this case. The doctrine there laid down by that expositor of marine law, Lord *Mansfield*, twenty-four years ago, has been recognized as law in subsequent cases; and if now it were to be decided that the interest of these commissioners was not insurable, it would render unintelligible the doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain in *Le Cras v. Hughes* was not certain, yet it was all but certain that the property would be given according to the custom of the Crown in such cases. Captain Luttrell had an interest for which he would not have taken £20,000; and it would be a strange thing that he should not be allowed to insure that interest against the perils of the sea." There is a decision of a foreign court of prize very nearly corresponding with *Le Cras v. Hughes* in 2 Valin, art. 15, fol. 57. By the French ordinance, future profits were prohibited to be insured. The author, in commenting upon the article, says: "It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm"; and cites an adjudication by the parliament of Aix. In *Routh v. Thompson*, 11 East, 433, Lord *Ellenborough* made the following observation upon the principal case: "In *Le Cras v. Hughes*, which was cited in argument, part of the captors at least, viz. the seamen, were considered as having a vested right to the ship and cargo as prize, to a certain extent; and the court decided that the

<sup>2</sup> See preceding notes.

meant by this word? Mr. Arnould says:<sup>1</sup> "It is an *expectancy*; that is, not a mere imagination or vague possibility, but a moral certainty." But it seems to us exceedingly inaccurate to say that an "expectancy" is the same thing as a "moral certainty," and neither the cases to which Mr. Arnould refers, nor his remarks concerning them, would lead to any such confusion of language.<sup>2</sup> That which is only expected cannot be certain; for that which is certain is much more than that which is only expected. The phrase used by the judges in the leading case of *Lucena v. Craufurd* is frequently quoted: "Where there is an expectancy coupled with a present existing title, there is an insurable interest."<sup>3</sup> We have already seen, however, that the expectancy will be sufficient, if, instead of a present existing title to goods, there is a definite contract, the execution of which will give a title. If we apply this to the question, whether there be such an insurable interest in the freight at a certain time in a certain voyage, the decisions enable us to go to some extent with reasonable certainty. A ship is going in ballast to a port where the ship-owner owns goods which she shall there take on board and carry to another port;<sup>4</sup> or he does not own the goods yet, but has contracted to purchase them, and has prepared to pay for them, and the goods are ready to be delivered to him or to be put on board;<sup>5</sup>

capture was within the prize act, and the captors had therefore a right vested by that act. It is true that another question (which Lord *Mansfield* considered by no means the strongest) was raised, — whether possession and the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounted to an insurable interest, and the court gave a decided opinion that it did. But what fell from Lord *Eldon*, in *Lucena v. Craufurd*, 2 B. & P. 223, is materially at variance with the decision of the Court of King's Bench on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of King's Bench in respect to a contingency of

the nearly certain kind which was then under consideration would afford no rule to govern a case circumstanced like the present."

<sup>1</sup> 1 Arnould on Ins. 245.

<sup>2</sup> *Grant v. Parkinson*, 3 Doug. 16; *Barclay v. Cousins*, 2 East, 544.

<sup>3</sup> 2 Bos. & Pull. N. R. 294.

<sup>4</sup> *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. 346. In this case the policy was on freight from N. to W., thence to B. The assured had bought a cargo which was to be taken on board at W. and conveyed to B.; it was held that "the interest on the whole freight commenced at the time of the vessel's sailing from W."

<sup>5</sup> It is declared in *Flint v. Flenyng*, 1 B. & Adol. 45, in opinions of Lord *Tenterden*, C. J., and *Bayley* and *Parke*, J. J., in an action on a policy of in-

or a shipper at that port has the goods and has contracted with the owner to put them on board ;<sup>1</sup> or a charterer has contracted with the owner to take the ship at that port and thereafter pay for the use of her ;<sup>2</sup> — in either of these cases we have no doubt the owner has an insurable interest in freight. This he would have although the charterer had no goods at the port to put on board the vessel, and it were proved that he could get no goods there, for he would still be bound to pay, as for dead freight, for whatever part of the vessel he had hired and could not fill. And if a shipper has contracted with the owner to ship goods at that port if the vessel reaches it, we should say that the owner has an insurable interest in the freight of these goods, as soon as the ship sails for

insurance on freight, where the loss was declared to be occasioned by incapacity to receive freight already contracted for, such incapacity being occasioned by the destruction of the vessel, that “the risk on freight does not attach until goods are either actually shipped, or there is an actual contract for shipping them.” See also *Montgomery v. Eggington*, 3 T. R. 362; *Thompson v. Taylor*, 6 T. R. 478; *Horncastle v. Suart*, 7 East, 400; *Truscott v. Christie*, 2 Brod. & B. 320; *Warre v. Miller*, 4 B. & Cress. 538. •

<sup>1</sup> *Thompson v. Taylor*, 6 T. R. 478. This was an action on a policy of insurance on half the freight of the ship *Nancy* from L. to T., and at and from T. to W., thence to H. It was set forth in the declaration that the ship was chartered to proceed to T., and take on board certain pipes of wine in readiness there, thence to sail for H.; and it was further shown that the ship while on her voyage to T. was captured by the enemy. *Grose, J.*: “The question is, whether the plaintiff’s right to freight had commenced; for, if it had, he has a right to recover on the policy. And it seems to me that the right commenced by the sailing of the ship on the voyage described in

the charter-party. The ship had begun the voyage, which, had it been completed, would have entitled the plaintiff to freight; but the ship was taken during the voyage, by which the plaintiff loses his freight, and for this loss he calls upon the underwriter on his contract of indemnity. Here the right to freight was to commence before the goods were taken on board at T., namely, by her sailing from this country to T. in the course of her voyage. It was said that this was not an insurable interest, because the plaintiff had neither an interest in the ship nor in the voyage insured; but the fact is otherwise; for, though the goods were not on board the ship, the plaintiff had an interest in the voyage, and had begun to do that for which he would have been entitled to a recompense under the charter-party if he could have completed it.”

<sup>2</sup> It was held in *Truscott v. Christie*, 2 Brod. & B. 320, that where an owner had contracted to carry passengers from a certain port and to make alterations for them, and had made these alterations in his ship for their convenience, and had shipped water for them, it was an inception of the risk.

that port, although the shipper had neither bought them nor contracted for them.<sup>1</sup> It would be enough if the ship-owner had contracted with some one to be a shipper, and his ship was going to that port to receive the goods under the contract.<sup>2</sup>

Let us suppose, however, that the ship is going to that port, as from New York to Calcutta, with orders for the master to buy there certain goods, within certain limits, and with funds on board sufficient to buy those goods, which may be dollars, or a cargo salable at that port, or bills, or credit, and the goods thus ordered to be bought are ready for sale at that port, within those limits of price, at the time when the ship arrives there. The cargo so purchased is to be brought back to New York; and the ship-owner has insured his freight of the same from Calcutta to New York. The ship is lost by a peril of the sea on the way to Calcutta. Can the insured recover on his insurance on freight? Mr. Phillips states that a case of this kind occurred in Boston, and was decided in favor of the insured by referees, "whose authority upon this question would compare not disadvantageously with that of the tribunals."<sup>3</sup>

<sup>1</sup> *Flint v. Flemying*, 1 B. & Adol. 45, *ante*, p. 177, n. 5. See also *Montgomery v. Egginton*, 3 T. R. 362; *Truscott v. Christie*, 2 Brod. & B. 336; *Parke v. Hebeon*, *Ib.* 329; *Forbes v. Aspinall*, 13 East, 331; *De Vaux v. J'Anson*, 5 Bing. N. C. 579; *Riley v. Hartford Ins. Co.*, 2 Conn. 373; *Livingston v. Columbian Ins. Co.*, 3 Johns. 49; *Gordon v. American Ins. Co.*, 4 Denio, 362. In this case, *Bronson*, C. J., says: "Where there is a charter-party for a voyage, in the course of which the goods are to be taken on board and the freight earned, there is an inception of the risk the moment the ship breaks ground for the voyage, though the time for receiving the cargo has not yet arrived." *Thompson v. Taylor*, 1 T. R. 478, *supra*; *Horncastle v. Stuart*, 7 East, 400; *Williamson v. Innes*, 1 Moody & Rob. 88, 8. C. 8 Bing. 79, n.; *Moses v. Pratt*, 4 Campb. 297.

<sup>2</sup> *Gordon v. American Ins. Co.*, 4 Denio, 363; *Warre v. Miller*, 4 B. & C. 538; *De Vaux v. J'Anson*, 5 Bing. N. C. 519; *Flint v. Flemying*, 1 B. & Ad. 45; *Hart v. The Delaware Ins. Co.*, 2 Wash. C. C. 346.

<sup>3</sup> 1 Phillips on Ins. 190: "The case was that of the ship *Eclipse* of Salem, which was piratically plundered of specie on the western coast of Sumatra, in 1836, having part of her homeward cargo of pepper on board, and a sufficient supply of specie to purchase the remainder, there being at the time a sufficient supply of pepper on the coast. The freight for the voyage round was insured. If no insurable interest in the freight of the homeward cargo accrued until the shipment or purchase of the pepper, and only to the extent of such shipment or purchase, the policy did not afford the indemnity evidently intended by the parties; for

It is true that in that case the ship lost but a part of her means of purchase by the peril insured against, and arrived safely, and with the funds left bought a part of the home cargo. But the referees allowed the claim for the full freight. Mr. Phillips is of opinion that the award was equitable and proper in respect to a voyage conducted as East India voyages usually were at the time it was made. Can we, however, say that, on general principles, the ship-owner has an insurable interest in freight under such circumstances? This would be to found this interest upon an expectancy which was not strengthened either by existing title or by actual contract. It would be difficult to distinguish this expectancy from those which have been deemed insufficient to create an insurable interest.<sup>1</sup> And we do not think that the principles of insur-

it appeared by the policy that the outward shipment was to consist of specie, the freight of which separately would be but a trifle, and yet one entire full premium was given on the amount of freight for the whole voyage out and home, sufficient to indemnify the assured if the same amount of freight were considered to be at risk out and home. In consequence of the piracy, the ship returned with only part of a cargo, and the assured claimed indemnity for his loss of freight. There were other questions between the parties, and the objection to this claim was not very strongly urged by the underwriters. The referees were decidedly in favor of allowing the claim under these circumstances."

<sup>1</sup> *Knox v. Wood*, 1 Campb. N. P. 543. In this case insurance was effected on the ship *Friendship*, "at and from Bristol to St. Thomas and Jamaica, and from thence back to Dublin." The declaration, after averring interest, set out a charter-party between the plaintiff and the owner of the *Friendship*, whereby it was agreed that she should carry out a cargo, which she then had aboard, to St. Thomas; that, having

landed it, she should proceed to Jamaica, and there take in a cargo of colonial produce for Dublin; it was further averred that the ship was captured on her way from St. Thomas to Jamaica. In the argument, the Attorney-General stated that the plaintiff had entered into agreement with a house in Jamaica that he should send out ships, for which they were to provide cargoes, and that this ship was sent out in consequence of the agreement; but, by reason of the capture, the cargo intended for her had been laden on another vessel. The Attorney-General further held: "By a particular contract there may be an interest created in both freight and commission before the goods are put on board, and, by reason of the charter-party in this case, the plaintiff had an insurable interest when the ship sailed from St. Thomas for Jamaica." But Lord *Ellenborough* said: "It strikes me that this was a mere expectation. The plaintiff had an interest in the ship from St. Thomas only in the expectation of a cargo. The expectation was frustrated by capture, and the interest was never on board. This is an insurance of an expectation of an ex-



ance, as indicated in the cases we cite, would lead to this conclusion. In one case in this country it has been distinctly denied.<sup>1</sup>

pectation. I am perfectly satisfied myself that the plaintiff cannot recover upon this policy. To decide otherwise would be to repeal the statute." Verdict for defendant.

*Forbes v. Cowie*, Id. 520. Action on policy of insurance on the freight of the *Chiswick* at and from any port or ports of Hayti to Liverpool. The ship arrived at St. Domingo with a cargo, the property of the plaintiff, to be bartered for goods which were to be brought by the ship to Liverpool. Part of the outward cargo was bartered accordingly for fifty-five bales of cotton, which were put on board the ship. The remainder of the outward cargo still remained on board when she was wrecked. A considerable part of the outward cargo was saved, and was afterwards exchanged for coffee and dye-wood, the freight of which would have been of

larger value than the sum insured, if the ship had not been lost. The defendant settled for the freight of the fifty-five bales of cotton; and the question was, whether he was further liable.

On the part of the plaintiff it was argued, that here the outward and homeward voyage formed one adventure, and that there existed an inchoate right to the whole of the freight insured at the time the loss happened. They cited in point the case of *Horncastle v. Suart*, 7 East, 400. Lord *Ellenborough* said: "I am more inclined to doubt the authority of *Horncastle v. Suart*, than to think the underwriter is liable in the present case. There, however, there was one charter-party for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained. Here I can entertain no doubt. The underwriter

<sup>1</sup> On the trial of the case of *Riley v. The Hartford Ins. Co.*, reported in 2 Conn. 368, it appeared that the plaintiffs had effected an insurance on the brig *Commerce* "on a voyage from New Orleans to Gibraltar, with liberty to go to Malaga and the Cape de Verds for salt, and back to her port of destination in the United States." The policy was a valued one. The vessel sailed from New Orleans for Gibraltar with goods on board estimated to be of the value of \$6,000, to be transported as freight, arriving in safety. With part of the freight money the plaintiffs purchased at Gibraltar 216 qr. casks of wine, and the residue, being about \$2,000, remained on board the vessel. This money was to be invested at the Cape de Verds in salt, which was to be transported thence

to the United States; but no contract was made for the salt. The vessel would have contained, in addition to the cargo on board, 6,000 bushels, and the money on board was sufficient to purchase that quantity; the freight of which from the Cape de Verds to the United States would have been worth more than \$2,000, the amount insured on freight in the policy. The vessel sailed from Gibraltar for the Cape de Verds, but was wrecked on the coast of Africa, and totally lost. The plaintiffs abandoned to the defendants the vessel and freight then on board, and claimed a total loss on both. The defendants paid the amount on the vessel, but resisted the claim for total loss on freight. The freight on the goods on board at the time of the wreck did not amount to \$2,000.



If a ship be chartered to go from one port to a second, and from the second to a third, and from the third to a fourth, and so on,

does not insure that the ship shall have a freight, but only that the owner shall be indemnified for the loss of the freight of goods put on board. What goods were on board when the ship was lost? The outward goods. They were not to be brought home on freight; they were to be bartered at St. Domingo. They were the means by which the homeward cargo was to be procured. How, then, has the plaintiff been damnified by the subject-matter of the insurance? By losing the freight of the fifty-five bales of cotton, and that he has been already paid by the defendant." The plaintiff was accordingly non-suited, and in the ensuing term the court refused a rule to show cause why this non-suit should not be set aside. See also *Forbes v. Aspinall*, 13 East, 323. As to the cases which at first sight would seem to be *contra*, as *Thompson*

*v. Taylor*, 6 T. R. 478; *Livingston v. Columbian Ins. Co.*, 3 Johns. R. 49; *Horncastle v. Suart*, 7 East, 400; *De Longuemere v. Phoenix Ins. Co.*, 10 Johns. 124; *De Longuemere v. New York Ins. Co.*, 10 Johns. 201; *McKenzie v. Sheddon*, 2 Campb. 431; *Homer, J.*, in *Riley v. The Hartford Ins. Co.*, 2 Conn. 368, well remarks: "Freight is sometimes applied to denote the compensation for the use of the ship, and sometimes the compensation for the transportation of merchandise. The former happens when there is a charter-party of affreightment, or, as it is usually said, when the ship is let to freight. In this event, when the ship is hired, so soon as her voyage is entered on, the right to freight commences. Let the ports of destination be ever so numerous, if there is an entire freight for the performance of the whole voyage, there

On the part of the defendants it was contended, that, "whether the policy be valued or open, the defendants were liable only for the freight which the vessel had begun to earn and was actually earning at the time of loss; and that the subject of such freight must be either goods actually on board, or a contract by which the ship-owner, aside from the perils insured against, would be entitled to demand it." *Swift, C. J.*, says: "It is said that the nature of the contract is, that the insurers engage that the insured shall not be prevented, by any of the perils insured against, from gaining the freight insured; that when the risk is once commenced, and there is a loss within the policy, the assured are entitled to the whole. But on this principle there may be assurance of freight to any

amount, and if the voyage is commenced, with a cargo of the most trifling value, and there should be a loss, the assured would be entitled to recover the whole sum insured. Such is not the nature of the contract. The construction is, that the assurers assure the sum mentioned on freight that shall once commence to be earned; not that the vessel shall take in a cargo, the freight of which shall equal the sum insured, and then that it shall not be lost by any of the perils insured against. From the nature of the contract the freight must exist, by having a cargo on board the vessel before the policy can attach. Where such right to freight has commenced, there is something for the policy to operate upon, and the engagement is, that such freight shall not be defeated by

and the charterer is to pay one whole freight for the whole round voyage, and the owner insures this whole freight, the insurable

is an inchoate right to the sum agreed on for freight so soon as the ship breaks ground. From this moment the hire of the ship is at risk, and constitutes a legal subject of insurance. Although the charterer omits to put on board the expected merchandise, and the ship performs her voyage in ballast, the right to freight is perfected. The voyage, though divisible, is not in charter-parties

usually divided. There is one voyage consisting of destinations to several ports, and terminating at the place from which the ship originally set sail. For this voyage there is one freight due on its ultimate completion. This one freight is at risk so soon as the voyage has commenced, and an indemnity may be given against all the losses to which it may be exposed."

any of the perils insured against. If it be necessary that freight must commence to be earned before the policy can attach, then it follows, that the insurance can operate only on such freight as actually exists, and cannot operate on the freight of a cargo expected to be laden on board the vessel; for it may as well be said, that the insurance may attach when no cargo is laden on board the vessel, as on a part of the cargo not laden; and it is agreed that, if no cargo is taken in, there can be no freight on which the policy can operate. Such appears to be the true construction of the contract, arising from the terms of it, and this is fully confirmed by the decision in the case of *Forbes v. Aspinall*, 13 East, 323. The cases generally relied on by the plaintiff are, where the ship-owner, by the contract of charter-party, became entitled to the freight, if the voyage was not prevented by the perils insured against, and where there could be no doubt of his right to recover the whole sum on that ground. But admitting the policy to be valued, then, on the principles adopted in the before-mentioned case, the plaintiffs could not recover for any freight excepting on the goods actually on board the vessel at the time of loss. For though the

policy be valued, yet it has reference to freight on all the goods intended to be carried on the voyage insured; and if, by the perils insured against, a part only of the goods are lost, the assured can recover only in proportion; for otherwise a large sum as freight might be recovered for a very small cargo. I am of opinion that the plaintiffs are entitled to recover for a partial loss only." And *Hosmer, J.*, in the same case, says: "The freight in the case before us was not derivable from the hire of the brig, but from the transportation of merchandise by the ship-owner. To ascertain when the *right to freight commenced*, a different criterion is necessary than in the instance before discussed. [Instance of charter-party for round voyage.] The right commences when the goods are put on board, or, at furthest, when a part has been received and the rest are ready to be shipped. The underwriter does not insure that the ship shall have freight, but only that the owner shall be indemnified for the loss of freight on goods put on board. It matters not whether the ship-owner contemplates the purchase of goods at a given port on which to procure a freight with money he has in possession, or which is due to him at the place of

interest of the owner in the whole begins when the ship sails under this charter on the first passage.<sup>1</sup> We think this would be

destination, or on his personal credit. In either event his right to freight cannot commence until he has shipped on board the contemplated cargo. The insured have a right to compensation for the loss of their brig, and of freight on the goods actually laden on board. Thus far the actual loss has happened; and they are entitled to the stipulated indemnity." The other judges were of the same opinion, and judgment was rendered for a partial loss, — the amount to be ascertained, pursuant to agreement of parties, by persons to be appointed for that purpose. See also Marshall on Ins. 192, 193.

<sup>1</sup> On this point, *Thompson v. Taylor*, 6 T. R. 478, is the leading case. This was an action on a policy of insurance on half the freight of the ship *Nancy*, valued at ———, "at and from London to Teneriffe, at and from thence to any of the West India Islands (Jamaica excepted), and at and from thence to the Bay of Honduras." The declaration alleged, after stating the policy, that before the making of the policy the plaintiff, by charter-party, chartered the ship upon the voyage, in which charter-party it was agreed that the ship should proceed to Teneriffe, there receive on board certain pipes of wine, and thence proceed to Barbadoes, &c. The ship duly sailed from London, and was captured by the enemy before reaching Teneriffe. Lord *Kenyon*, C. J., held: "This case is clearly distinguishable from *Tonge v. Watts*, 2 Str. 1251" (to which reference had been made in the arguments of counsel), "and rests on peculiar circumstances. The property, against the loss of which the assured wishes to be indemnified, is that which he had a right to

receive under the charter-party; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends on the words of the charter-party, which are, 'that the ship should, on or before the 9th of February, depart out of the river Thames, and directly proceed to Port Oratava in Teneriffe, and, after the ship should be ready to receive goods, lie twenty days and load and receive on board her from the Messrs. Cox 500 pipes of wine, and then sail and proceed to Barbadoes.' Now it seems to me that the argument on behalf of the plaintiff is well founded, that there was an inception of the contract by the owner of the ship; for the ship *did* sail from the Thames towards Teneriffe, and was captured in the course of that voyage. Here, as the plaintiff had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight. His contract under the charter-party was entire, and we cannot divide it; the ship was to sail from hence to Teneriffe, where she was to take wine on board and carry it to the West Indies; he was to receive freight for the whole voyage, and the plaintiff had performed part of the contract. Therefore, on the principle on which the case in *Strange* was decided, though the circumstances in that case were different from those in the present, I am of opinion that the plaintiff is entitled to recover." And *Grose*, J., said: "The question is, whether the plain-

so whether she had goods on board then or not. Nor can we see good reason for holding that this insurance would not attach for the whole round voyage, when the ship sails in ballast for the port at which the charter is to commence.<sup>1</sup>

What has been said above as to the beginning of the interest of the owner in the freight is, generally at least, applicable to a charterer, whether he has hired a whole or a part of the ship; because his earning of freight would seem to be put at risk in the same way that the owners' would have been.<sup>2</sup>

tiff's right to freight had commenced, according to the expression used in the case in *Strange*; for, if it had, he has a right to recover on the policy. And it seems to me that the right commenced by the sailing of the ship from the Thames on the voyage described in the charter-party. The ship had begun the voyage, which, had it been completed, would have entitled the plaintiff to freight; but the ship was taken during the voyage, by which the plaintiff loses his freight, and for that loss he calls upon the underwriter on his contract of indemnity. In *Tonge v. Watts* the right to freight had not commenced, because the goods were not on board; but here the right to freight was to commence before the goods were taken on board at Teneriffe, namely, by her sailing from this country to Teneriffe in the course of her voyage. It was said that this was not an insurable interest, because the plaintiff had neither an interest in the ship nor in the voyage insured; but the fact is otherwise; for, though the goods were not on board the ship, the plaintiff had an interest in the voyage; and he had begun to do that for which he would have been entitled to a recompense under the charter-party, if he could have completed it." In this opinion Mr. Justice *Lawrence* concurred. And the judgment of the court below was affirmed.

See also *Livingston v. The Columbian Ins. Co.*, 3 Johns. 49; *Horncastle v. Stuart*, 7 East, 400; *De Longuemere v. Phoenix Ins. Co.*, 1 Johns. 127; *De Longuemere v. New York Ins. Co.*, 10 Johns. 201; *McKenzie v. Shedden*, 2 Campb. 431; *Hart v. The Delaware Ins. Co.*, 2 Wash. C. C. 346. In this case upon a policy of freight "from New York to Wilmington and thence to Barbadoes," the assured had bought a cargo which was to be taken on board at Wilmington, had not the vessel been lost on the way thither. Mr. Justice *Washington* held, that the interest in the whole freight commenced at the time of the vessel's sailing from New York. See also *Livingston v. The Columbian Ins. Co.*, 3 Johns. 49.

<sup>1</sup> In *Robinson v. Manufacturers' Ins. Co.*, 1 Met. 146, in which Mr. Chief Justice *Shaw* remarked: "In general the inception of a voyage, even in ballast, from one port to another, to take a cargo pursuant to a charter-party, is an inception of the voyage on which the freight is to be earned, and, if the vessel is lost before arriving at the first port to take in cargo, it is a loss on freight."

<sup>2</sup> *Mestayer v. Gillespie*, 11 Vesey, 629. In this case Lord Chancellor *Eldon* says, in substance, that the property in the freight may be distinct from that in the ship, and is an insurable interest; and alludes to *Camden v.*

The terms of the charter-party sometimes divide the perils of the sea between the owner and the charterer. In such case it is obvious that either party has an insurable interest only against the risks that he assumes.

If an owner sells his ship, reserving to himself the use of it for a certain voyage, or a certain time, we think he stands as to his insurable interest in the same position as if he had sold the ship outright, and afterwards hired her by charter for that voyage, or that time. Nor can we see good reason to doubt this, although it has been held differently.<sup>1</sup>

The charterer of a ship or the shipper of goods not unfrequently advances money to the owner; and the question may arise, whether he has an insurable interest in the amount thus advanced. If it is a mere loan to the owner, to be repaid at all events, and with no reference to the arrival of the goods or the completion of the voyage, it would not be at any risk from the perils of the sea; and the advancer would have no insurable interest in the money advanced.<sup>2</sup> But if it is only a part of his freight, paid at the be-

Anderson, 5 T. R. 709, as a case in which "it was never doubted that the property in the freight and in the ship might be in different persons."

<sup>1</sup> In the case of *Riley v. Delafield*, 7 Johns. 522, decided *contra*, the facts were: "A sold a vessel to B, in whose name she was registered; but it was agreed between them that A should have the whole benefit of the *freight* to arise from a voyage for which A had previously chartered the vessel, and on which she was about to sail. B insured the vessel, as owner, for the voyage, and A procured insurance to be made on the freight of goods on board the same vessel, for the same voyage; but the agreement between A and B, or the peculiar nature of A's interest, was not communicated to the insurer. It was held that A had not an insurable interest, or such an interest as could be insured under the name of freight, without disclosing and specifying its peculiar nature. We think this decision opposed

to the weight of authority and of reason. We may refer to the following cases as bearing on this question: *Oliver v. Greene*, 3 Mass. 133 (cited fully p. 174, n. 3), in which it was held that a part owner who agrees to take the whole ship at his own risk may insure it generally without specifying his interest; *Taylor v. Wilson*, 15 East, 324, to the same effect; and *Bartlett v. Walter*, 13 Mass. 267, which is, in substance, that charterers who have no interest, who have agreed to navigate and insure the ship at their own risk, may so insure it. The well-established principle that a mortgagor, or assignee for a valuable consideration, or the holder of any lien, may insure without specifying his interest, leads to the same conclusion.

<sup>2</sup> Mr. Arnould says: "It must very distinctly appear, by clear and explicit words to that effect in the charter-party, that the money advanced is an advance in part payment of the freight." 1 Arn.

ginning instead of at the end, he has an insurable interest.<sup>1</sup> Where the freight is advanced upon a common bill of lading, on which

Ins. 266 (Perkins's ed.). We know not why it is not enough simply to say, that the money advanced must be advanced as a part of the freight. Mr. Chief Justice *Abbott* is very clear on this point, in *Mansfield v. Maitland*, 4 B. & Ald. 584. It is held in *DeSilvale v. Kendall*, 4 M. & S. 37, that if money is advanced on charter-party, and the ship is lost, the money so advanced cannot be recovered. The head-note reads: "Cove-

nant by charter-party made between the master of the ship and the freighter, upon a voyage from Liverpool to Maranham, and thence back to Liverpool, that the freighter should pay for the freight from Liverpool to Maranham £120, and from Maranham to Liverpool at the rate of 2½d. on cotton which should be delivered at Liverpool, such freight to be paid as follows, viz.: £120 for freight of the outward cargo to M.,

<sup>1</sup> See preceding note. See also *Saunders v. Drew*, 3 B. & Adol. 445. By a charter-party of affreightment for a voyage from the port of London to Calcutta and back, on the usual terms, it was further agreed that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessities provided; in consideration of which, the freighter agreed to pay the owner for such voyage at the rate of £1 a ton per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months', two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills. The ship made her voyage to Calcutta and thence to the Isle of France, and all terms of the charter-party were so far duly performed. At the Isle of France the plaintiff, according to the above-mentioned proviso, hired the ship for a voyage to Calcutta, and paid the master four months' hire in advance. The vessel sailed and was lost on her voyage; the question was,

whether the plaintiff was entitled to recover back any part of the money he had advanced. Lord *Tenterden* held: "I am of opinion that the defendants are entitled to judgment. The law is thus laid down by *Saunders*, C. J., in an anonymous case, 2 Shower, 283: 'Advance money paid before, if in part of freight; and named so in the charter-party, although the ship be lost before it come to a delivering port, yet wages are due, according to the proportion of freight paid before; for the freighters cannot have their money.' This is the ground of the doctrine which was acted upon in *DeSilvale v. Kendall*, 4 M. & S. 37, that money paid in advance for freight cannot be recovered back. Here the money was advanced in payment of freight, and there is nothing in the terms of the contract to take it out of the established rule: on the contrary, the stipulation that, if an intermediate voyage be made, the owner shall refit the vessel, shows that the four months' advance was intended to reimburse him, in any event that might happen, for the expense so incurred." And in this opinion *Littledale*, *Parke*, and *Patterson*, J. J., concurred. See also *Mansfield v. Maitland*, 4 B. & Ald. 585; *Winter v. Holdimand*, 2 B. & Ad. 649.



the shipper will be bound to pay no freight if the goods do not arrive, and the goods are lost by a peril of the sea, the shipper

and as much cash as might be found necessary for the vessel's disbursements in Maranham, to be advanced by the freighter, his agents or assigns, to the master when required, free from interest and commission at the current exchange of the place, and the residue of such freight to be paid on delivery of the cargo in Liverpool." The ship arrived at Maranham, where the £120 outward freight, and £192 for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for Liverpool, but was lost by capture. Held, that the freighter was not entitled to recover back the £172. The opinion of Lord *Ellenborough*, of too great length for quotation here, and which cannot well be condensed, sets this subject in its true light, and in a most satisfactory way. In *Robbins v. The New York Insurance Company*, 1 Hall, S. C. Rep. 325, Mr. Chief Justice *Jones* says: "The advance of the freight gives no right to insure beyond the amount of the advance; and, where the owner of the vessel is liable to refund in case of loss, his right to insure that amount—resulting from the lien the charterer has upon the freight for his security—requires that proof should be made of the actual payment of the money alleged to be advanced. In most cases the charterer will have a lien upon the freight for the advances he makes the ship-owners, as his security against their inability to refund. That lien gives him an interest under the charter-party as, or in the nature of, a mortgage, which he may insure; and the better opinion seems to be, that he may insure it in general terms under the

name of freight, without describing it as a mortgage interest. But, to enable him to recover, he must prove the fact of the advance. His covenant or agreement to make it is not sufficient. Possibly the presumption of actual payment from the express stipulation to pay at the home port, previous to the ship's departure, and the fact of the departure of the ship from thence on her voyage, might be sufficient as preliminary proof, especially if the insurers make no objection for the want of proof of actual payment, but put themselves upon other grounds of defence. But the actual proof of the advance cannot be dispensed with as proof in chief on the trial." See also *Wilson v. Royal Exch. Ass. Co.*, 2 Campb. 626. The case of *Sanson v. Ball*, 4 Dallas, 459, is worthy of notice. It appeared on the trial that the plaintiff had purchased three eighths of the tonnage of the ship *Richmond*, at a certain price, which was paid before the vessel sailed; that the vessel was captured by the enemy, and this action was brought. Whether the interest insured was insurable or not, engaged the attention of the court. Mr. Chief Justice *Tilghman* said: "In order to determine whether the plaintiff's interest was insurable, we must first ascertain the nature of it. It seems to be a kind of interest not much known in Europe, though well known in this city. The plaintiff advanced a sum of money to the owners of the ship, in consideration of which they gave him a right to fill up three eighths of the tonnage of the ship for that voyage, with goods either his own or the property of others. It is called in the policy 'freight advanced,' an expression well calculated to show



may recover his advance from the owner.<sup>1</sup> The bill of lading provides that they are to be delivered safely, "the dangers of the sea excepted." But this clause is intended only, and operates only, to save the owner from being answerable for the value of the goods, if they are lost by a danger of the sea. It implies no agreement that the freight paid in advance, whether the whole or a part, shall not be repaid by the owner if it be not earned.<sup>2</sup> Consequently such an advance does not give the shipper an insurable interest.

its meaning. Now, what is there in this interest which should exclude it from the benefit of insurance? There is nothing unlawful in it. It is subject to loss; for, whether the plaintiff used the tonnage for the transportation of his own goods, or of the goods of others, he would lose his money unless the ship performed the voyage in safety. In the case *Gregory v. Christie* (cited in *Parke*, 11), my Lord *Mansfield* thus expresses himself: "I should think that the words 'goods, specie, and effects' did not extend to the plaintiff's interest, if we were only to consider the words by themselves. But here is an express usage which must govern our decision. A great many captains in the East India service swear that this kind of interest is always insured in this way." Now, although there have not been a great many witnesses in this case, yet there has been one, very much conversant in the business of insurance, who stands uncontroverted. Upon this point, therefore, — the insurability of the plaintiff's interest, — whether it is considered on principle or usage, I have no doubt but the law is with the plaintiff." See also *Anonymous case* in 2 Shower, 283.

<sup>1</sup> In *Mashiter v. Buller et al.*, 1 Campb. 84, which was an action for the recovery of freight, the vessel having been lost, it appeared that a special contract was entered into for the payment of freight as soon as the goods were placed on board

the vessel, the words in the bill of lading being, "freight for said goods being paid in London," and "the shippers paying freight for the said goods in London." Lord *Ellenborough* held, that these words only meant that freight should be paid in London instead of at Lisbon, and that they by no means dispensed with the performance of the voyage. He added, that, if the defendants had paid the freight upon the shipment of the goods, they might have recovered every penny of it back again.

<sup>2</sup> *Griggs et al. v. Austin et al.*, 3 Mass. 20. The case is fully stated in the opinion by Mr. Chief Justice *Parker*: "This action is brought to recover back a sum of money paid by the plaintiffs to the defendants for the freight of a number of barrels of apples taken on board their ship, the *Topaz*, bound from Boston to Liverpool. It is proved by the bill of lading signed by the master, and an account made out by the owners with their receipt upon it, that the whole freight agreed upon was paid before the sailing of the vessel, and the report finds that, before the vessel arrived at her port of delivery abroad, she was stranded or wrecked on a beach within six miles of her port, by means of which a large portion of the plaintiffs' apples were destroyed or rendered worthless by the salt water. The plaintiffs contend that the consideration for the payment of the money was the agreement

So, too, money lent to the master, payable out of freight, creates no insurable interest in the freight, unless it is payable *only* out of

on the part of the owners to transport the apples in their ship to Liverpool, and that, having failed to do this, they are bound in conscience to return the money; and that an action at law lies for it, upon the ground of failure of consideration. The defendants insist that the payment of the freight in advance imposes all risks upon the owners of the goods, and that, the failure of transportation and delivery having happened without their fault, there is no legal nor equitable principle which will oblige them to refund. Some reliance in support of their defence is placed upon the condition, expressed in the bill of lading, that the goods are to be delivered safely, 'the dangers of the seas excepted'; but as this condition has in practice been applied only to the contract in relation to the goods themselves, so as to protect the ship-owner from a demand for their value in case of loss by perils of the sea, and has never been construed to bear upon the rights of the parties in relation to the freight, we cannot see anything in that instrument which can affect the question before us. The commercial principle recognized by the Continental nations is reduced to the form of a maxim in the Napoleon Code de Commerce, tit. 8, art. 302: 'No freight is due for merchandise lost by shipwreck or stranding, plundered by pirates, or taken by enemies. The master is bound to restore freight which shall have been advanced, if there is no agreement to the contrary.' This, like most of the provisions in the modern French codes, is not the introduction of a new principle, but the new promulgation of antecedent law in a more convenient form, as was the case

with the Digest and other works executed under the auspices of Justinian, of whom the Emperor Napoleon was in this respect an imitator. It is admitted in argument, that such is the law of the Continental powers, but it is suggested that it has not been introduced into the English law, and therefore there is no evidence that it belongs to our common law. It is true there are few cases in the English books touching this point, but it is equally true that the principle has never been denied there; on the contrary, in the case cited from the 1 Camp. (*Mashiter v. Buller, supra*) Lord *Ellenborough*, who was a great mercantile judge, recognizes it to the full extent of the Code de Commerce. But one of the counsel for the defendant has put the case on ground which admits the general principle, that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does not appear from the evidence, that is, from the bill of lading, and the receipt on the account. But we think they furnish no evidence of such agreement; they merely prove that the freight was paid in advance. Indeed, it will be seen at once, that, if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary. Now, if the mere payment proved such stipulation, there would be no case for the rule to operate upon. So that when Mr. Justice Bay-

freight, and would therefore be lost if the freight were lost, or unless the freight is assigned or pledged as a security for it.<sup>1</sup> In that case we should say the lender has the same insurable interest in the freight that he has in any interest or property held by him as security for a debt.

#### SECTION IV. — *The Insurable Interest in Profits.*

THAT profits are an insurable interest has long since been settled.<sup>2</sup>

ley says, that, where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means something more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument."

<sup>1</sup> *Wilson v. Royal Exch. Ins. Co.*, 2 Campb. 626. "The plaintiff also declared upon another policy on £ 300 lent to the captain, payable out of the freight. But Lord *Ellenborough* held, that this was not an insurable interest."

<sup>2</sup> *Barclay v. Cousins*, 2 East, 544. The case is sufficiently stated in the extracts from the opinion of *Lawrence, J.*: "The case states that the insured shipped on board the ship *Jonah* a cargo of goods to be carried on a trading voyage; so that it appears he had an interest in the profits to arise from a cargo which was liable to be affected by the perils insured against. And the question is, if, on an insurance made on the profits to arise on such a cargo, the

plaintiff can recover. As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived, not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in that case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subjected to the perils, he might obtain without more risk than the capital itself would be liable to; and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune, be totally unproductive;

But here as elsewhere the question may arise, whether, at the time of the loss, such an interest exists in the insured as would constitute an insurable interest. A dictum of Lord Mansfield<sup>1</sup> would lead to the conclusion that there could be no interest in profits, unless the goods on which the profits are to arise are, at the time of the loss, the goods of the insured. We doubt, however, whether this interest, like most other insurable interests, may not be created by a contract not yet executed. That is, if one has agreed to purchase goods, which goods are to be carried for him on a certain voyage whereby he believes their value will be increased, and he is insured for this enhanced value under the name of profits, we see not why he may not recover if he is prevented from earning those profits only by a peril insured against.

If he has purchased goods "to arrive," they will not be his unless they arrive; and he can lose nothing on the goods; for, if lost, they are not lost as his. But if he expects that, in case of

and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire, which would continually be lessened by the ordinary expenses of living, if there were no means of replacing that expenditure in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss the party is a sufferer by not having used his money in a way which might, with a moral certainty, have made a return, not only of his principal, but a profit; and it is but playing with words to say that in such case there is no loss because there is no possession, and that it is but a disappointment. Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of an insurance upon profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be ref-

erable to the positive institutions of different nations, who have thought it wise to prohibit it. . . . It has been objected to this sort of insurance, that the subject, having no physical existence, cannot be insured. This objection would hold against insuring freight and bottomry and respondentia interest. Again, that the goods might be going to a losing market, in which case the assured would gain by the loss of his goods; but, if that were the case, it would be evidence on *non assumpsit*, as it would prove either that the plaintiff was not damnified as to profit by the loss of the goods, or that at the time of loss he had no interest in the thing insured." Judgment for plaintiff. See also *Grant v. Parkinson*, cited in *Marshall on Ins.* 95; *Abbott v. Sebor*, 3 Johns. C. 37; *Tom v. Smith*, 3 Caines, 245; *Mumford v. Hallett*, 1 Johns. 433; *Fosdick v. Norwich Marine Ins. Co.*, 3 Day, 108.

<sup>1</sup> As cited in *Lucena v. Craufurd*, 3 Bos. & Pull. 85, from Mr. Dunning's brief and a MS. note.

their arrival, when he will pay for them, and they will become his, they will be worth much more than he pays for them, and he insures this expected increase of value as profits, we have authority, and we think reason, for holding that he has an insurable interest in these profits.<sup>1</sup> An English case would seem to hold otherwise ;

<sup>1</sup> *French v. The Hope Ins. Co.*, 16 Pick. 397. In an action on a policy of insurance upon profits valued at the sum of \$1,000, it appeared that the plaintiff had entered into a contract with one R., in which it was agreed that the plaintiff, in consideration of the sum of \$1,000 paid by him to R., should have a right to take one half of any palm-leaf which should be imported by R., upon paying one half of the cost and charges on its arrival in Boston ; that subsequently R., having received a bill of lading of palm-leaf shipped upon his account, applied to the plaintiff to elect whether he would take one half thereof, or not ; that the plaintiff elected to take it, and paid to R. the sum of \$600 as an advance upon it, which was repaid to him after it was known that the palm-leaf had been discharged at Charleston in a damaged condition ; and that there would have been a profit if the palm-leaf had arrived at Boston. The opinion of the court was delivered by Putnam, J. : " Ever since the case of *Grant v. Parkinson*, reported in Park, 267, and in Marshall, Bk. 1, c. 4, § 2, and Bk. 1, c. 3, § 8, it has been understood that profits were insurable. And we perceive no good reason against it. If it be lawful to insure freight, as the earnings expected to arise from the employment of the ship, it would seem equally reasonable and expedient to insure profits expected from goods or from anything else exposed to marine peril. So that the only question in this case is, whether the plaintiff had any inter-

est in the subject-matter insured. And upon this question we have no doubt but that, by the agreement in the case between the plaintiff and Rix, the plaintiff had a substantial interest at risk. For if the ship had safely arrived with the merchandise mentioned in the policy, the plaintiff would have been entitled to profit. If she were lost, he would have lost the profits which were expected. The objection principally relied upon by the counsel for the defendants is, that the plaintiff was not the owner of the merchandise, that he could not have insured the goods, and, *a fortiori*, not the profits on the goods which did not belong to him. The rule, if received to the extent laid down, would prevent the insurance of commissions on goods consigned to the plaintiff. In such a case, put by Lord *Ellenborough* in *Stirling v. Brown*, 11 East, 629, his lordship observed : ' The indefeasibility of the property, therefore, is not the criterion of an insurable interest. If, in the case of the consignee, the goods should arrive safely, he would be entitled to commissions upon the sale. So, in the case at bar, if the goods had arrived, the plaintiff would have realized a profit.' The cases seem to us to be perfectly analogous. In each the party claiming profits or commissions has either to run the risk and bear the loss himself, or to get insurance against marine risk. In each case he has a real interest to protect. The plaintiff paid a valuable consideration for the profits insured by him, and the

but we think the decision in that case rested mainly on the circumstance that the purchase was only oral, and there was no contract which could be enforced.<sup>1</sup>

There is, however, another question in relation to insurance on profits, which is answered quite decidedly in English courts in one way, and in another way by the courts of this country. It is, Is it necessary to prove that the goods, if they had arrived in safety, would have made some profit? If the profits are insured on an open policy, it would of course be necessary to prove the extent of the loss, which could be done only by proving what profits the goods would have earned if they had not been lost. If the profits are insured at a valuation, and any profits would have been made, the whole valuation attaches. About this there is no question; but this arises when there is no proof that any profits whatever would have been made. The English courts, although the cases are not numerous, may be considered as having established the rule for that country, that unless it could be made to appear "pretty certain," to use Lord Mansfield's phrase, that some profits would have been made, the insured has no interest to which the insurance on profits could attach.<sup>2</sup>

transaction is not impeached on the ground of fraud. Now, we know no good reason why an owner of goods at sea may not sell the profits expected upon the termination of the voyage, as well as the goods themselves, or the principal or capital employed. Why may not the owner of a ship sell the ship to one man and the freight to another? If in the former case there were an insurance on goods, and an abandonment or payment of a total loss, the profits would incidentally follow the principal subject, and would belong to the insurer of the goods. And so of insurance upon the ship, and payment of a total loss, the underwriters would be entitled to the freight. But that consideration does not affect the present question, viz. whether profits may be insured by one who has not the absolute property in the goods, by a valued policy honestly made. We think such a

contract is valid." Judgment for plaintiff.

<sup>1</sup> Stockdale v. Dunlop, 6 M. & W. 224. As stated in the text, the contract for purchase was *verbal*. Baron Parke says: "At the time of the insurance and of the loss, there was merely an expectation of possession on the part of the plaintiffs, founded on the mere promise of the vendors, but there was a total absence of interest in the subject-matter of the insurance. There was no contract which could be enforced, but a mere promise on the part of Messrs. H. & Co. to deliver the oil when it arrived. There was no interest, whatever, either general or special, in the cargo."

<sup>2</sup> See Eyre v. Glover, 16 East, 218; Hodgson v. Glover, 6 East, 316; Hendrickson v. Margitson, 2 East, 549; Grant v. Parkinson, 3 Doug. 16.



In this country the weight of authority leads to the conclusion, that if the insured on profits owns the cargo on which the profits were to arise, this ownership of the cargo raises a conclusive presumption, that had they arrived there would have been some profit,<sup>1</sup> and then the valuation attaches. The Supreme Court of the United States so decided, but only by a majority.<sup>2</sup> We think, however, that this rule is established as a part of the law and practice of insurance in the United States.

#### SECTION V. — *Insurable Interest in Commissions.*

MR. JUSTICE KENT remarks that there is a great similarity in freight, profits, and commissions; the difference being that in the first profits arise out of the employment of the ship, in the other two it arises from the goods.<sup>3</sup> This difference, however, is very great, and it leaves but little more similarity than arises from the fact that they are all governed by the principle which runs through all these cases, and all others which come under the general head of insurable interest, namely, that the assured must have an interest in that on which he is insured, founded either on title or on contract.

A commission merchant may have a reasonable hope that certain cargoes will be sent to him for sale on commission; but he has not yet an insurable interest in those commissions. But if the goods are expressly consigned to him, and will certainly reach him unless the voyage be interrupted, he has now an insurable interest to the amount of his commissions on the sale, and it has been held that he may anticipate the consignment, and make valid insurance on the commissions.<sup>4</sup> But there is as yet nothing for the policy to

<sup>1</sup> In *Loomis v. Shaw*, 2 Johns. Cases, 36, under a policy on profits, where three eighths of the goods were lost, the court held it to be a loss of that proportion of the profits under the policy, without inquiring whether there would have been any profits had the goods arrived. And see also *Fordick v. Norwich Marine Ins. Co.*, 3 Day, 108; *Mumford v. Hallett*, 1 Johns. 439; *Patapsco Ins. Co. v.*

*Coulter*, 3 Peters, S. C. 222, *Thompson and Baldwin*, J. J. dissenting; *Alsop v. Com. Ins. Co.*, 1 Summer, 451.

<sup>2</sup> *Patapsco Ins. Co. v. Coulter*, 3 Peters, S. C. 222.

<sup>3</sup> *Abbott v. Sebor*, 3 Johns. Cases, 39.

<sup>4</sup> *Putnam v. The Mercantile Marine Ins. Co.*, 5 Met. 386. In this case, which turned on the point as to whether a commission merchant could



take effect upon, until the goods, being actually consigned, become subject to the risks insured against.

All bailees and all consignees, factors, or agents who have made advances on goods, or accepted bills drawn on them, or in any way become liable on account of them, have generally a lien on the goods; and wherever they have this lien they are as creditors holding security for their debts, and in this security they have an insurable interest.<sup>1</sup>

So a supercargo, if he has made a contract with any one interested in the cargo, by which he is to receive compensation for services rendered, has an insurable interest in the cargo.<sup>2</sup> Mr. Phillips adds what would seem to be a qualification of this rule; he says, "he has an insurable interest in respect to the subject of such contract so soon as he has done something, or begun to incur expenses or take steps towards the execution of it."<sup>3</sup> We should say that he has done something, and enough to give him an in-

insure his profits in anticipation of the arrival of the vessel, *Hubbard*, J., says: "The contract before us is that of an insurance on the expected commissions of a merchant upon goods on ship-board, in the progress of the voyage, and which are consigned to him for sale; but upon which he has made no advances, nor accepted bills on the faith of the consignment. This presents a case which has not yet been decided, and the question is, whether it is embraced within the principles by which contracts for the insuring of profits, and of expected freight, and commissions of supercargoes and masters have been held valid, or whether it is to be classed with wager policies, on the ground that it is a case of mere expectation, not coupled with an interest. . . . The case at bar, indeed, stands on the very borders of the line—which may be deemed almost shadowy—where interest ends and expectation begins; but the line,

however thin, must be drawn somewhere, or the difference between wager policies and those coupled with an interest must cease. And upon consideration we are of opinion, that the regular consignee of goods has an interest in his expected commissions, equivalent to that of expected profits, and that such commissions are the lawful subject of insurance."

<sup>1</sup> Mr. Justice *Washington*, in *Russell v. Union Ins. Co.*, 1 Wash. C. C. 409, says: "It is clear that a factor having a lien on goods has an insurable interest for the amount." See also *Seamans v. Loring*, 1 Mason, 127, per *Story*, J.; *Wolff v. Horncastle*, 1 Bos. & Pull. 316; *Conway v. Gray*, 10 East, 336; *Robertson v. Hamilton*, 14 East, 522; *Parker v. Beasley*, 2 M. & S. 423; *Bell v. Janson*, 1 M. & S. 201.

<sup>2</sup> This was not questioned in *Robinson v. N. Y. Ins. Co.*, 2 Caines, 357.

<sup>3</sup> 1 Phillips on Ins. 175.

surable interest, when he enters into the contract, accepts the offer of compensation, and agrees to render the services.

The cases on this subject, especially those which relate to commissions, frequently turn on the question of lien. Buller, J., said: "I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest."<sup>1</sup> But a lien is a right to retain possession of property in one's hands until the debt is satisfied; and there can be no lien until there is possession. If by the above remark of Buller it is meant that the debt or claim, to give an insurable interest in goods, must be such that when the goods come into the hands of the insured it will give him a lien on them for the claim, the remark must be at least generally true, although it might be doubted whether a supercargo in the case supposed would always have a lien, although he would if he were consignee as well as supercargo. We cannot doubt, however, that one may have an insurable interest in goods before they come into his possession, and without making any advance or incurring any expense about them whatever.<sup>2</sup> For, as we have said, a consignee has an insurable interest in goods consigned to him for sale, as soon as the consignment is made.<sup>3</sup> In an important case it was held that com-

<sup>1</sup> *Wolff v. Horncastle*, 1 Bos. & Pull. 323.

<sup>2</sup> See *Putnam v. The Mercantile Marine Ins. Co.*, 5 Met. 386.

<sup>3</sup> *DeForest v. The Fulton Fire Ins. Co.*, 1 Hall (N. Y.) S. C. Rep. 84. From the exhaustive discussion of this whole question, to be found in the opinion of Mr. Chief Justice Jones, the following extracts are taken: "The plaintiffs are insured on goods held by them on commission. They had no beneficial interest or right of property in those goods beyond the amount of their liens and just claims for their commissions on the sale, and the reimbursement of their advances and charges on account of the principals, to whom the goods belonged.

They were the consignees and factors of the general owners, with powers to sell; and in that character they had the right of possession, and the actual possession of the goods, and a special ownership against all the world, with the exception only of the principals, which entitled them to hold and dispose of the goods, to reclaim them if improperly usurped, and to maintain actions of trover for them as their own, if they chance to come into the possession of others and are wrongfully detained. And whether that possession and special ownership gave them an insurable interest under this special contract or not, is the material question. . . . It is well settled, that an insurable interest,

missioners appointed by the British government to take possession of certain prizes, and dispose of them, had an insurable interest in them.<sup>1</sup> But we shall have to refer to this case again.

in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and it has often been determined, that each distinct interest in the same subject may be protected by a separate policy on the subject for the party interested in it. The mortgagor and mortgagee may both insure, and so may every party who has any special interest to protect, or who represents the property as the qualified owner of it; and in the latter class of cases the sole question is, whether the special interest alone, or the entire subject, is covered by a policy effected upon the property in the name of the qualified owner. And that question may turn upon the nature of the ownership or interest, the purposes for which the property is held, and the powers incident, to the relations of the special owner, or necessary to the safety of the insured premises; or it may be settled by usage and course of dealing. . . . From the case of *Lucena v. Craufurd*, which, from the discussion it underwent, and the judicial opinions brought to bear upon it, is entitled to the highest consideration, I deduce the proposition, that a consignee with general powers to manage and sell the property has an insurable interest in the goods in his possession as consignee, and may insure them in his own name and aver the interest in himself. . . . But again, it does not always require either the legal title, or beneficial interest in the prop-

erty, to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure the goods he contracts to convey; yet he has neither the legal title or the beneficial interest in them, but he is responsible for their loss. His insurance is upon the goods; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss on deterioration of the property by the perils insured against. . . . The fair result of the authorities, and the just consequences of the special property of the factor, in the goods held by him for sale on commission, is, that he has an insurable interest in them to the full extent of their value, and may insure them in his own name, and recover the amount payable for the loss on the averment of interest in himself. As between the factor who effects the insurance, and recovers for the loss, and the consignor to whom the goods belong, a trust may result from the operation, and the consignor be held accountable to the principal for the avails of the insurance he effects, on the principles which would have applied to the proceeds of the sale, however exclusive the contract of insurance in its terms may be in favor of the factor, as absolute owner. But this is an accountability with which the underwriter has no concern. The test of his liability is the insurable interest of the assured. And the rule of interest, which I incline to apply to the factor, while it violates no principles of law, essentially subverts the

<sup>1</sup> *Lucena v. Craufurd*, 5 Bos. & Pull. 323, see *post*, p. 205.

This lien they had as trustees, and it may be stated as a general rule, that all trustees of property who have possession of the property, or a right of possession, have an insurable interest in the property. This rule has been applied by the Supreme Court of the United States<sup>1</sup> to the case of a master, to whom a cargo was

purposes of commerce, and the general interests of the community, without trenching upon the rights of the insurers, or involving them in any extra-hazardous risk. The operations of the commission merchant necessarily require that he should have the goods of those who employ him, in the same warehouses, and so commingled, as to form one common stock, ostensibly of the same ownership, and exposed to the same risks, and partaking of the superintendence, safeguards, and care of the same agents. The consignee, or commission merchant, has the possession, management, and disposition of the whole. Purchasers derive their title solely from him; he has the power to sell the goods to his own creditor, in satisfaction of his own debts; and trespassers and wrong-doers who interfere with the property are amenable to him for the consequences. He is, in effect, the trustee, as well for the charge and management of the consignment as for the sale of the goods and the receipt of the price, and his principals are the beneficial owners, to whom he is accountable for the net proceeds; and he must, for the judicious exercise of his trust, have the power to protect the goods, while unsold, by insurance. Why, then, should he be required to sever his insurance upon the property, or to open distinct policies upon the goods of each consignor, or to specify therein several consignments? No one valuable purpose is to be answered by the

separation; for the risk on each is the same, and the whole is under the direction of the same agency. The convenience of all parties is consulted by covering the whole with one insurance, in the name of the consignee, who has the actual possession and charge of the whole, and the same special property in all." See also opinion of Mr. Justice *Oakley*, S. C. 129; *Carruthers v. Sheddon*, 6 Taunt. 14, S. C. 1 Marsh, 416.

<sup>1</sup> *Buck et al. v. Chesapeake Ins. Co.*, 1 Peters, S. C. 151. In this case the plaintiffs, as agents of one Fitch, a shipmaster, insured at his request ship and cargo from Porto Rico to Baltimore. It appeared that the vessel was the property of Fitch, as was the smaller portion of the cargo, but that nearly two thirds of the cargo was the property of another person, and consigned to Fitch. The court say, as to whether Fitch could effect insurance on the whole cargo or not: "Here, we think, the facts make up a clear case of insurable interest. The only doubt, probably, arises from one of the most prolific grounds of uncertainty on many subjects, viz. the use of terms originally inaptly selected, but now rendered legitimate by use. It is only necessary to inspect a few cases on this doctrine, to be satisfied that the term 'interest,' as used in application to the right to insure, does not necessarily imply *property*, in the subject of insurance" (and he cites *Craufurd v. Hunter*, 8 T. R. 18; and *Lucena v. Craufurd*, 3 Bos. & Pull. 75, and continues). "Putting down the

assigned, with all proper documents to enable him to cover the property as his own.

While we cannot think it true that an insurable interest in goods never exists, unless where the insured has a lien on them, it is on the other hand undoubtedly true, that, wherever there is a lien on goods, it gives an insurable interest in them. Thus, a master of a vessel has in general no insurable interest in the ship, or cargo, or freight, because the law-merchant is unwilling to lessen his personal interest in the success of the voyage, by giving him the protection of insurance; and he has therefore no lien on ship, cargo, or freight, for his wages.<sup>1</sup> But he may make advances either on the freight or cargo, and would then have a lien on them, and an insurable interest in them.

So, too, the owner or master of a ship, and every other carrier of goods, is liable to some extent for the safety of the goods; and he has an insurable interest in them against all the risks for which he is thus liable.<sup>2</sup>

By the law-merchant, all material-men have a lien on a foreign ship for repairs and supplies;<sup>3</sup> and by the municipal law of many

present case, therefore, to its lowest grade of insurable interest, it is equal to that of the plaintiffs in the two cases alluded to, for Fitch was, at least, the agent and trustee of Medina, to transport his goods from Porto Rico to a market, and to secure them from the chances of capture and loss. But this case is stronger than the English cases cited; for, by the act of Medina himself, Fitch was exhibited to the world, clothed with all the national documents which evidence an absolute property; and for many purposes the real owner would have been estopped to deny it. We will instance the payment of duties, for which, either as owner or consignee, our laws held Fitch absolutely liable. We have therefore no doubt of the sufficiency of the insurable interest in this case."

<sup>1</sup> In *Watt v. Potter*, 2 Mason, 88, Mr. Justice Story says, that "a master certainly has no right to apply the proceeds

of the cargo to the payment of his own or the seamen's wages." And in *Barker v. Marine Ins. Co.*, Id. 372, the same Justice says: "It is true that the master is intrusted with the care of the property for the owners, and is bound to take all reasonable measures to preserve it. And that is exactly his duty in all cases. But, strictly speaking, he has no interest in the property. He is a mere agent or carrier. If the property is lost, in the course of the voyage, without his fault, it is the loss of the owners, and not his loss. He has not an insurable interest because he may be responsible for negligence; for this insurance is not against a liability to actions, but against a loss of property."

<sup>2</sup> *DeForest v. The Fulton Ins. Co.*, 1 Hall (N. Y.) S. C. Rep. 84.

<sup>3</sup> *The Calisto*, Davies, C. C. R. 29, Ware, J.: "By the general maritime law, material-men — under which term,

States, mechanics and others employed about ships have a lien for their work and labor. Wherever either of these liens exists, it creates an insurable interest in the ship.

If on any of these grounds an insurable interest exists in ship, freight, or cargo, a question may then arise, what is the extent of this insurable interest. We should say the general if not the universal answer was, the person having this interest may insure the whole property. Any loss of any part of it may occasion pecuniary loss to him, at least in theory. Therefore, he may be insured to the full value of the property; but if a loss occurs he would recover only to the extent of his loss.<sup>1</sup>

A commission merchant may insure for the full value of the goods consigned to him, and may recover not only what will indemnify him for the loss of his commissions, but the full value; so much of that value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he intends to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their previous authority to insure, or their subsequent ratification of his act. This, however, belongs rather to the topic of insurance by agents.

in the language of the Admiralty, are included all persons who supply materials or labor in building or repairing vessels, or furnish supplies which are necessary for their employment, as provisions for the crew — have, in addition to the personal liability of the debtor, a lien on the vessel for their security. Ordinance de la Marine, Liv. 1, tit. 14, art. 16; 1 Valin, 363; Consulat. de la Mer. c. 32, 33, 34, Boucher's Translation; Cleirac. Jurisdiction de la Marine, p. 351, art. 18, n. 4, 5. It is commonly said that this principle was borrowed by the maritime from the civil law. Abbott on Shipping, pp. 108, 109. But it seems more probable that it originated in the maritime usages of the Middle Ages, where we find the origin of all the general principles of the law of the sea. But this principle of the maritime law is not

acknowledged by the common law, and has never been received by the commercial jurisprudence of England. Abbott on Shipping, 108. It has, however, been partially adopted in the maritime law of the United States. Our law allows the lien when the supplies are furnished to a foreign vessel; and for the purpose of the lien a vessel is considered as a foreign vessel when she is in a port out of the State to which she belongs or where her owners reside." See also 1 Phillips on Ins. 179; The William and Emmeline, 1 Blatchf. & H. Adm. 66, 71.

<sup>1</sup> See opinions of Jones, C. J., and Oakley, J., in *DeForest v. The Fulton Fire Ins. Co.*, 1 Hall (N. Y.) S. C. Rep. 84, where this point is elaborately presented.



SECTION VI. — *Insurable Interest of Captors.*

No ships belonging to a civilized nation have any right to capture the vessels of other nations, except as they are authorized by their government to do so. Nor, if authorized to make prizes, have they any other interest in the property captured than such share of its proceeds, if it be condemned and sold, as the law gives them.<sup>1</sup> For this share they have an insurable interest in the captured property.<sup>2</sup>

<sup>1</sup> "The sole and exclusive right to all prizes rests in the government, and no individual can acquire any interest therein, unless under their grant and commission; and all captures, therefore, made without such grant and commission, enure to the use of the government, by virtue of its general prerogative." *Per Story, J.*, in *The Joseph*, 1 Gall. 558. See also *The Elsebe*, 4 Chr. Rob. 408; *Routh v. Thompson*, 11 East, 428; *S. C.* 13 East, 274; *Nicol v. Goodall*, 11 Vesey, 157.

<sup>2</sup> See the *Omoa* case, *Le Cras v. Hughes*, 3 Doug. 81. Lord *Mansfield* gives the following reasons for deciding that the captors had an insurable interest in the captured property: "The question whether the sea-officers had an insurable interest depends, 1. on the prize act and proclamation; or, 2. putting the act and proclamation out of the case, on the possession, and on the expectation warranted by almost universal practice. The first is the strongest ground, because it gives an interest which will support an action. But, second, is the expectation a sufficient interest? Wherever a capture has been made, since the Revolution, by sea or land, the crown has made a grant; there is no instance to the contrary. Then, is the contingency of the ship's coming home a risk which the captors

may provide against? It has been properly said, that, since the statute of Geo. II., insurance is a contract of indemnity. An interest is necessary, but no particular kind of interest is required. In *Grant v. Parkinson*, the profits of a voyage, though not a vested interest, were held insurable. An agent of prizes may insure his profits, though they are in contingency; such an insurance prevents risks from neutral claims; it also guards against a loss arising from the disappointment of an expectation which hitherto has never been disappointed. On either ground I think the policy is a good one." Lord *Eldon* dissents from the opinion of Lord *Mansfield* as to the point that the mere expectation of a grant from the crown could amount to an insurable interest, and thinks that the right of the captors to insure might be put on other grounds. "The captors," says this distinguished judge, in *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 228, "not only had the possession, but a possession coupled with the liability to pay costs and charges, if they had taken possession improperly, and also a liability to render back property which should turn out to be neutral." In *Boehm v. Bell*, 8 T. R. 154, Lord *Kenyon* adopts the doctrine of Lord *Eldon* as above stated. In this case a captured ship, which had



The laws of all civilized states require certain conduct of captors, and a certain amount of care of the property, and hold them to some responsibility for it. For this responsibility they have an insurable interest, much in the same way as other responsible bailees.<sup>1</sup>

The insurable interest of captors, prize agents, and others in the captured property has come before the English courts for adjudication during their many wars.<sup>2</sup> By these cases many principles were determined which would undoubtedly have great weight with the courts of this country, should similar questions come before them. The earliest question was, whether the captors had an insurable interest in the prizes, when they had no interest in them by statute, but strong reasons to expect a grant from the crown. Lord Mansfield said: "The crown always makes the grant, and there is no instance to the contrary,"<sup>3</sup> and on this ground held that their expectation of receiving the property captured was sufficiently certain to found an insurable interest. Lord Eldon,<sup>4</sup> Lord Ellenborough,<sup>5</sup> and Tindal, C. J.<sup>6</sup> doubt this doctrine, but can scarcely

been insured by the agents of the captors, was, by a decree of the Court of Admiralty, restored to her owners; and the captors claimed a return of premium. The court refused their claim. Lord Kenyon said: "The assured had possession of the captured property, and from that possession certain rights and duties resulted. If it was a legal capture, the captors were entitled; if the capture was improperly made, they were liable to be called to account in the courts of admiralty, where they might be amerced in damages and costs. It was important to them to take care that there should be something forthcoming to answer the amount of these damages; on this ground, therefore, I am clearly of opinion that the assured had an insurable interest."

<sup>1</sup> See opinion of Lord Kenyon in *Boehm v. Bell*, 8 T. R. 154, *supra*.

<sup>2</sup> The first case was that of *Le Cras v. Hughes*, or the *Omoa* case, reported in

3 Douglas, 81, and alluded to by Park, 406. A statement of the law, as laid down by Lord Mansfield in this case, will be found in a preceding note. In this case, the sea and land forces had jointly captured the fort of Omoa and certain Spanish vessels lying under its walls, one of which ships was laden with captured property and insured on account of the officers and crew of the ships under Captain Luttrell "at and from Omoa to London." She was lost on her homeward voyage by perils of the sea. Judgment in this case was delivered May 3, 1782. The case of *Boehm v. Bell*, also alluded to *supra*, was decided February 8, 1799.

<sup>3</sup> *Le Cras v. Hughes*, 3 Doug. 86.

<sup>4</sup> *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 323.

<sup>5</sup> *Routh v. Thompson*, 11 East, 434.

<sup>6</sup> *De Vaux v. Steele*, 6 Bing. N. C. 370.

be regarded as distinctly overruling it. It may be inferred from all the cases that such a mere expectation of the future grant from the crown would give an insurable interest, provided the practice and usage of making such grants could be shown to be so long and uniform as to leave no reasonable doubt that the grant would be made. Here it will be seen that an insurable interest is founded upon an expectancy which rests neither on vested title, nor on contract, nor on law, but is strengthened otherwise until it has force enough to give this interest.

In speaking of Lord Mansfield's doctrine, Lord Eldon suggests a very different ground on which they had an insurable interest. It is, that they had possession, and by this possession were liable to pay costs and charges, and a further liability to return the property, provided it should turn out that there was no sufficient reason for its condemnation.<sup>1</sup> The principle thus stated by Lord Eldon had been not long before adopted and applied by Lord Kenyon in a case which came before him. Three English captains had captured an American ship and her cargo as a Dutch prize, and had given notice to their agents in England, who made insurance on the property for them. The American owners claimed this property in the English Admiralty, and it was restored to them, with the exception of a small part of the cargo that was condemned. The captors then claimed of the insurers a return of so much of the premium as belonged to the ship, and that part of the cargo which was restored. Lord Kenyon refused their claim, on the ground that certain rights and duties and liabilities had resulted from their possession of the property; that they might be amerced in the courts of admiralty in damages and costs; and "it was important to them to take care that there should be something forthcoming to answer the amount of these damages." And therefore they had an insurable interest in the whole property.<sup>2</sup>

An interesting case arose in this way. In the year 1794, Holland was occupied by the French, with whom the English were then at war. And the English government, on the expectation of war, by an order in Council, in February, 1795, directed that all Dutch ships should be seized, brought into England, and there detained. The king was empowered to appoint commissioners for the care

<sup>1</sup> *Lucena v. Craufurd*, 2 Bos. & Pull.      <sup>2</sup> *Boehm v. Bell*, 8 T. R. 154.  
N. R. 323.

and management of these ships and cargoes. Such commissioners were appointed; and they caused an insurance to be made upon certain ships and cargoes captured under this order in Council. The ships and cargoes were totally lost on their way to England. The case was first tried before the Court of King's Bench in 1798, then before the Exchequer Chamber in 1802, then before the House of Lords in 1806, again before the King's Bench in the same year, and was finally disposed of by the House of Lords in 1808. Many questions arose and were discussed; but by far the most important question was, whether the commissioners had an insurable interest in the ships and cargoes insured before their arrival in England.

It is impossible to draw from the case a positive and unquestionable answer to this question, although the plaintiffs finally recovered. It may be said, however, that a majority of all the judges in the different tribunals thought the commissioners had an insurable interest, on the ground "that an inchoate interest, though imperfect till a given contingency shall take place, is nevertheless insurable." But very high authorities thought otherwise; Lord Eldon declaring that he could not point out an insurable interest, "unless it be a right in the property, or a right derivable out of some contract about the property."<sup>1</sup>

<sup>1</sup> *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 323. This case occupied the attention of the English courts for more than eight years, and, as Mr. Arnould well says, "in the House of Lords gave rise to one of the most elaborate and ingenious legal discussions ever raised upon a point of maritime law." As stated in the text, the English government, by an order in Council of February, 1795, directed that all Dutch ships bound to and from the ports of Holland should be seized, for the purpose of being brought into English ports and there provisionally detained. The reason for this order was the fact that, in the course of the previous year, Holland had been overrun by the armies of the French Republic, with whom England was then at war, and it appeared highly

probable that her reduction to French subjection would be permanent. With a view to provide for the custody of ships that might be brought in under this order, the king was empowered to appoint commissioners "for the care, management, sale, or other disposition, according to his Majesty's instructions," of such ships and cargoes. On the 15th June, 1795, Craufurd and others were appointed such commissioners. Before this appointment was made, a captain in the English navy had captured a fleet of Dutch merchantmen, homeward bound from the African coast, and carried them into St. Helena for the purpose of being further carried to England. Accordingly, on the 2d of July, four of these ships, with their Dutch cargoes on board, sailed from St. He-

There was then another case of somewhat similar character founded on occurrences which took place under a similar order of

lena, and on the 22d of August, Craufurd and his co-commissioners, having received notice to that effect, caused an insurance to be effected on these ships and cargoes on their own account, under the style of "The Honorable Commissioners for the Sale of Dutch Property." All of these ships were totally lost. One of them, however, was not so lost till after the 15th day of September. This date is important, because on that day a proclamation of reprisal, or, in other words, a direct declaration of war, was made by the King of England against the ships, goods, and subjects of the United Provinces.

Upon the loss of the ships becoming known, Craufurd and his co-commissioners brought an action upon the policy. The main question in the case was, whether the plaintiffs, under the circumstances, had an insurable interest, under their commission, in the ships and cargoes insured before their arrival in England. In the declaration, interest was averred in the first count to be in Craufurd and his associates as commissioners; in the second count, to be in the crown. In the Court of King's Bench, Lord Kenyon and the rest of the judges held that the plaintiffs had an insurable interest sufficient to sustain the first count in the declaration, and judgment was accordingly given for the plaintiffs for the whole sum. The case was here known as *Craufurd v. Hunter*, and is reported in 8 Term Reports, 18. Under the name of *Lucena v. Craufurd*, this decision was affirmed in the Exchequer Chamber in 1802, by a majority of the judges, Mr. Justice *Chambre* dissenting in a

very forcible opinion. The report may be found in 3 Bos. & Pull. 75. "The grounds," says Mr. Arnould, "on which the majority founded their judgment were substantially the same with those which had prevailed with the Court of King's Bench, and rested on the principle that an inchoate interest, though imperfect till a given contingency shall take place, is, nevertheless, insurable." Mr. Justice *Chambre* thought that the powers of the commissioners were confined to the care of ships actually brought into the ports of the United Kingdom and provisionally detained there; and that in this case the commissioners had no power, because the case of the vessels was not one of compliance with this condition. The case then came before the House of Lords (2 Bos. & Pull. N. R. 269 - 298), when eight of the judges held that the plaintiffs had an insurable interest, upon the same grounds as before. Mr. Justice *Chambre* adhered to his former opinion, which was supported by Mr. Justice *Lawrence*, by Lord *Eldon*, and by Lord *Erskine*. Lord *Ellenborough* also seems, by his known course in subsequent decisions, to have been of concurrent opinion. Upon the advice of Lord *Eldon*, the case was sent down for a new trial under a *venire de novo*, on the collateral ground that, as one of the ships had not been lost till after the 20th of September, the finding of the jury, inasmuch as it gave general damages partly made up of the average loss on this ship, which ought not to have entered into it, was erroneous. On the trial, before Lord *Ellenborough*, a verdict was found for the plaintiffs upon the second count of the declaration,

- Council, respecting Danish ships. This was decided by the King's Bench against the insured.<sup>1</sup>

which averred the interest to be in the king. 3 Bos. & Pull. 75, 1801. A bill of exceptions was taken to Lord *Ellenborough's* judgment, which was, however, affirmed by the House of Lords, June 29, 1808. See 1 Taunt. 324. "The effect of this discussion, as the subsequent course of our jurisprudence shows, has been adverse to all claims of interest founded on mere contingent grants from the crown." Arnould, 270.

• <sup>1</sup> This case, which is of importance in its bearing on the insurable interest of captors, is *Routh v. Thompson*, 11 East, 426. In pursuance of an order in Council of September, 1807, by which all Danish ships were directed to "be detained and brought into port," a Danish ship was captured by a British privateer and carried into Lisbon, where her original cargo was sold, and some repairs on her were made. She was then loaded with another cargo and sent to London by the captors. She sailed from Lisbon on the 3d of November, and insurance was effected on her by the plaintiff as agents of the captors, on the 12th of the same month. On the day the ship sailed, a formal declaration of war had been made by Great Britain against Denmark. The vessel being lost on her homeward voyage, this action on the policy was brought, the plaintiffs averring the interest, in the first count, to be in the captors, in the second, to be in the crown. The sole question was, whether the captors, as such, had, under the circumstances, an insurable interest. It was contended that they had: first, because they had a possession coupled with

a well-grounded expectation of a grant from the crown; and second, because such possession rendered them liable, either to the crown or to the foreign owner, for the safe custody of the ship, and therefore gave them an interest in her safety.

"As to the first point," said Lord *Ellenborough*, "as the ship had been taken, not as a prize of war after a declaration of hostilities, but merely under an order in Council to detain and bring into port," the captors had no claim, as in the *Omoa* case; that, under these circumstances, they could claim nothing as of right from the crown, and even if the ship had arrived in safety would have had nothing "but the chance of a grant." It was accordingly held, that they had no insurable interest, because, as his lordship concisely remarked: "A man has no right to an indemnity because he has lost the chance of receiving a gift." The second ground was held inapplicable, because here a formal declaration of hostilities had intervened before the loss, "which at once vested the right of ownership in the crown, put an end to all claim on the part of foreign owners, and freed the captors, as agents for the crown, from all liability for acts done within the scope of their authority, which it did not appear that they had in any degree exceeded."

But where a ship is taken as a prize of war, and the captors have a right under the prize acts, it is held in *Stirling v. Vaughan*, 11 East, 619, that they have an insurable interest on that ground.

We have dwelt on these cases, because they are exceedingly instructive upon the difficult question, what will render an expectancy sufficient to create an insurable interest in the property to which the expectation is attached. But the main question raised in those cases would seem to be settled in the United States against an insurable interest in prizes, unless there be a law giving a share in them, or an actual grant from the government.<sup>1</sup>

SECTION VII. — *The Insurable Interest of a Lender on Bottomry and Respondentia.*

LOANS on bottomry, or respondentia, are in the strictest sense maritime loans. They are governed by rules which were originally the usages of ship-owners and merchants, and have been adopted and confirmed by courts, and systematized by such principles of the general law of contracts as were found applicable to them. A loan on bottomry<sup>2</sup> is a loan on the security of the ship. A loan on respondentia<sup>3</sup> is a loan on the security of the goods.

<sup>1</sup> The *Joseph*, 1 Gall. 545; S. C. 8 Cranch, 451, in which Mr. Justice Story says: "The sole and exclusive right to all prizes rests in the government, and no individual can acquire any interest therein, unless under its grant and commission; and all captures, therefore, made without such grant and commission enure to the use of the government, by virtue of its general prerogative."

<sup>2</sup> The *Atlas*, 2 Hagg. Adm. 48, 53; *Scarborough v. Lyrus*, Latch. 252, Noy, 95. In *Blaine v. The Charles Carter*, 4 Cranch, 328, Chase, J., said: "A bottomry bond made by the master vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her, which may be enforced with all the expedition and efficiency of the admiralty process." See also *Johnson v. Shippen*, 2 Ld.

Raymond, 982; *Johnson v. Greaves*, 2 Taunt. 344; *U. S. v. Delaware Ins. Co.*, 4 Wash. C. C. 418.

<sup>3</sup> This instrument is sometimes in the form of a bill of sale, more usually in the form of a bond, and is almost the same thing in respect to the goods which a bottomry bond is to the ship. See *The Gratitude*, 3 Rob. Adm. 240, 260; *The Osmandi*, 3 W. Rob. 198, 214; *The Nostra Senora del Carmine*, 29 Eng. L. & Eq. 572. The master has no authority to give a bond on the cargo alone. If he does, the ship and freight are first liable, and then the cargo, because it is the same as if he had given a bond on the ship, freight, and cargo. *La Constancia*, 4 Notes of Cases, 285. And, where a bond was given on the ship and cargo, it was held that the freight was also liable. *The Prince Regent*, cited 2 W. Robb. 88.



- But in both cases it is of the essence of these maritime loans that the debt is not recoverable if the ship be lost, or if the goods be lost.<sup>1</sup> So far as it is a loan on security, it may be likened to a pledge or a mortgage. But a pledgee must have and keep possession of the pledge; while a lender on bottomry or respondentia never takes possession of the ship or goods, the very purpose of such loans being to enable the ship to go on her way and carry the goods to their destination.

A mortgagee may or may not take possession of his security. But the essential difference between these contracts is that already intimated. Whether the property pledged or mortgaged be or be not destroyed, the borrower is still liable. But if the ship or goods hypothecated under these maritime contracts are destroyed, the borrower loses his debt. It is in fact, by the terms of the contract, paid by their loss. It is obvious, therefore, that the lender on bottomry or respondentia has an insurable interest in the ship

<sup>1</sup> The Atlas, 2 Hagg. Adm. 48; Jennings v. Ins. Co. of Penn., 4 Binney, 244; Greeley v. Waterhouse, 19 Maine, 9; Leland v. The Ship Medora, 2 Woodb. & M. 92, 107; Rucher v. Conyngham, 2 Pet. Adm. 295, 303; The Brig Draco, 2 Sumn. 157; Bray v. Bates, 9 Met. 237; The William and Emmeline, Blatchf. & H. Adm. 66; The Brig Atlantic, 1 Newb. Adm. 514; The Emancipation, 1 W. Rob. 124; Stainbank v. Fenning, 11 C. B. 51. In The Nelson, 1 Hagg. Adm. 169, the sum was to be paid within one month "after the ship arrived at her port." This was held to be a sufficient description of a sea risk. In Simons v. Hodgson, 3 B. & Ad. 50, the bond, after reciting that the vessel had received damage, and that the master had borrowed £1,077, proceeded as follows: "I bind myself, my ship, her apparel, tackle, &c., as well as her freight and cargo, to pay the above sum with £12 per cent. bottomry premium; and I further bind myself, said ship, her freight, and cargo, to the pay-

ment of that sum with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, *whether she do or do not arrive at the port of London*, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with £12 per cent. bottomry premium, and all charges are duly paid." Held, reversing the judgment of the Court of Common Pleas, 6 Bing. 114, that this was an instrument of bottomry, that the words "my arrival" must be understood to mean "my ship's arrival," and that the words, "I make liable the said vessel, &c., whether she do or do not arrive at London," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of the loss of the ship.



or the goods, for even stronger reasons than those which would give this interest to the pledgee or mortgagee.<sup>1</sup>

It is, however, equally obvious, that, if the contract be invalid, it gives the lender no hold upon the ship or the goods, and he has therefore no insurable interest in them, whether the contract still leaves the borrower liable or not.<sup>2</sup> It becomes important therefore to look at those rules of the law-merchant which determine whether these contracts are valid or void. This topic belongs more particularly to the law of shipping; and it will be enough if we now indicate these rules and principles without attempting to present them fully.

It was once a question, whether a bottomry bond could be made by the owner in the home-port.<sup>3</sup> They were originally made only by the master in a foreign port, when no other means were left to supply the urgent necessities of the ship. As where the ship if not repaired could not proceed on her voyage, and there was no way to raise the means of repair except by borrowing on bottomry. Practice, however, sufficiently sanctioned by adjudication, has established the rule, in this country at least, that the owner may make a bottomry bond in the home port, and this without any necessity,<sup>4</sup> and before the ship has ever sailed. The law-merchant, which is now a part of the common law, permits the lender to receive any amount of interest which the parties may agree upon, unless its exorbitancy

<sup>1</sup> See *Harman v. Vanhatton*, 2 Vern. 717; *Williams v. Smith*, 2 Caines, 13; S. C. 2 Caines, 110; 1 Emerigon, 237, c. 8, § 11; *Kenney v. Clarkson*, 1 Johns. 385; *Glover v. Black*, 3 Burr. 1394, 1 W. Bl. 396.

<sup>2</sup> See Maude & Pollock on Ships and Seamen, 216; *Glover v. Black*, 3 Burr. 1394; 1 W. Bl. 396.

<sup>3</sup> *Wilmer v. The Smilax*, 2 Pet. Adm. 295, note; *The Brig Draco*, 2 Sumn. 157; *Thorndike v. Stone*, 11 Pick. 183; *Greeley v. Waterhouse*, 19 Maine, 9. In *The Duke of Bedford*, 2 Hagg. Adm. 294, the bond was given by the owner of the ship, who was on board, at a foreign port. The master was also on board, and received the supplies as necessary, but refused to

sign the bond. A suit to dispossess the captain had previously been instituted. The court held that the bond was valid. See also *The Barbara*, 4 Rob. Adm. 1; *The Mary*, 1 Paine, C. C. 671. And if in such a case the owner is also master, although he professes to contract as master, he confers the same rights as if he gave the bond as owner. *The Ship Panama*, Olcott, Adm. 343.

<sup>4</sup> *Greeley v. Waterhouse*, 19 Maine, 9; *The Mary*, 1 Paine, C. C. 671; *The Brig Draco*, 2 Sumn. 157. But see *Greeley v. Smith*, 3 Woodb. & M. 236, 254. So of a respondentia bond. *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386; *The Brig Bridgewater*, Olcott, Adm. 35; *The Ship Panama*, Olcott, Adm. 343.

indicates either fraud or oppression, without subjecting the contract to the laws against usury.<sup>1</sup> It has been even said, that, unless more than legal interest is charged by the contract, it is not a loan on bottomry;<sup>2</sup> but this has been denied by Marshall, C. J.<sup>3</sup> If,

<sup>1</sup> *Thorndike v. Stone*, 11 Pick. 187; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386, 437.

<sup>2</sup> *Leland v. The Medora*, 2 Woodb. & M. 92, 107; *The Mary*, 1 Paine, C. C. 671. In *The Emancipation*, 1 W. Rob. 124, 140, Dr. *Lushington* said: "I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant, carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater emolument than the ordinary interest of £6 per cent., if the repayment of such loan was to depend upon the safe arrival of the vessel at the port of her destination after performing such a voyage." In this case only legal interest was stipulated for, and the repayment of the loan did not depend on the safe arrival of the vessel. The bond was held invalid. See also *Stainbank v. Fenning*, 11 C. B. 51; *Jennings v. Ins. Co. of Penn.*, 4 Binney, 244.

<sup>3</sup> It does not appear very distinctly from the case of *Selden v. Hendrickson*, 1 Brock. C. C. 396, whether the bond was given on legal or maritime interest, though the former seems to be the more

correct view, the decree being for the amount of the bond with seven per cent interest, that being the legal interest at the port where the bond was given; and *Marshall*, C. J., said: "In fact I can conceive no reason why a master may not, for the success of the voyage, hypothecate the vessel to secure a debt carrying only legal interest, in any case where he might bind the owner personally." See also *The Brig Atlantic*, 1 Newb. Adm. 514. In the case of *The Hunter, Ware*, 249, money was advanced, on the personal credit of the owner, for refitting the ship, and a bond subsequently given. The court held that the bond was invalid, but, on the libel being amended, rendered a decree for the sum advanced, with legal interest. Mr. Justice *Ware* said: "If the court has authority to separate the good from the bad, and to reduce the maritime premium, when an oppressive advantage has been taken of the necessities of the borrower, is it quite certain that it may not, in the exercise of its equitable powers, render judgment in a case like the present for the principal sum advanced with land interest?" See also the remarks of Mr. Justice *Story* in the case of *The Virgin*, 8 Pet. 538, 550. But in the case of *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340, where a sum of money was advanced on the faith of a bond, and subsequently a bond was made out in which a much larger sum was inserted, in order to deceive the underwriters, and two sets of accounts and vouchers were made out, Mr. Justice *Curtis* held the bond invalid, on the ground of fraud, and

therefore, a lender lends money on bottomry, for three or four times the legal interest, and then insures the ship for the amount of his bond, paying as a premium a small part of this extra interest, he is sure of the money loaned with the whole extra interest, either from the ship if it arrives safely, or from the policy if the ship be lost. Courts, however, always say, that, where the transaction is a mere device for getting usurious interest, it has none of the peculiar privileges of these maritime contracts, but is like any other loan on usury.<sup>1</sup> And whether this be the case we should consider a question for the jury.

The bond should always describe the risk which the lender assumes; and it is only against these risks that he has an insurable interest; for if the ship be lost by a peril, or from a cause, not at the risk of the lender, as, for example, if the ship be lost through the misconduct of the master or owner, the debt survives. The risks which the lender assumes are generally the perils of the sea, and any words which import that the money borrowed is not to be paid unless she arrives safely are sufficient to indicate this. Whatever be the phraseology of the bond, the insurable interest in the lender on bottomry is the risk he runs of having the bond discharged, by the perils which he assumes. The insurers on such an interest would not be held therefore, if the vessel be lost, but the bond becomes payable because the voyage or adventure was broken up and terminated, voluntarily, and without necessity, by the owner, or by the master, or by a third party.<sup>2</sup> Or if there be an unjustifiable deviation<sup>3</sup> or sale;<sup>4</sup> and still more, if the ship be

also was of the opinion that the libellants had no lien *in rem* on the vessel for the amount actually advanced, on the ground that the parties contracted solely with reference to the bond, and did not intend that a lien should exist on the ship as a security for the simple loan. This case was affirmed on appeal on the ground of fraud. *Carlington v. Pratt*, 18 How. 63. In the *William & Emmeline*, 1 Blatchf. & H. Adm. 66, the instrument, purporting to be a bottomry bond, bound the ship for a certain sum, with simple interest,

which was to be paid at all events. Mr. Justice *Betts* held that, though this was not in strictness a bond, yet the vessel was liable *in rem*.

<sup>1</sup> See note 1, p. 211.

<sup>2</sup> *Greeley v. Smith*, 3 Woodb. & M. 236.

<sup>3</sup> 2 Emerigon, *Traité à la Grosse*, c. 8, § 4; *Harman v. Van Hatton*, 2 Vern. 717; *Western v. Wildy*, Skin. 152; *Williams v. Steadman*, Ib. 345. In *Wilmer v. The Smilax*, 2 Pet. Adm. 295, note, the bond was given for a specific voyage, which was never commenced, but the

<sup>4</sup> *The Brig Draco*, 2 Sumn. 157.

intentionally lost.<sup>1</sup> If the lender is entitled to his money whether the vessel be lost or not, it is no longer a loan on bottomry, but is more like a loan on mortgage. The lender may still have the security of the ship; and his insurable interest would then be the same as that of any other lender on security.

It has indeed been said that the law-merchant itself under some circumstances creates the bargain of bottomry without any instrument. That is, if a master borrow money abroad, for the necessities of the ship, and so applies the money, giving no instrument of bottomry, the law-merchant gives to the lender a lien on the ship in addition to whatever remedy he may have at common law against the owner as his debtor.<sup>2</sup> But the circumstance that, while the lender has this lien on the ship, he does not lose his debt by the loss of the ship, but still has his claim against the owner,

vessel performed another. Held, that the right of the owner to demand his money back was complete the moment the vessel sailed on the new voyage. But a deviation from necessity will not have this effect. *The Armadillo*, 3 W. Rob. 251.

<sup>1</sup> In *Pope v. Nickerson*, 3 Story, 465, the vessel put into an intermediate port, having received damage, and was sold by the master. Subsequently she was repaired by the vendee, and made a voyage to the United States. Mr. Justice Story said, p. 486: "The next question is, whether, in the event detailed by the statement of facts and the evidence, the money on the bottomry bond became due and payable to the lender? I am of opinion that it did become due. The voyage was not completed from any incapacity of the schooner to perform it; and, in point of fact, she did, after being repaired, return safely to the United States. The voyage was broken up by the master voluntarily, upon the ground that the schooner was not worth repairing for the voyage, because the expense of the repairs would exceed her reason-

able value, or what ought, with reference to the interests of the owners, to be expended upon her, to enable her to carry the cargo to the port of destination. I do not say that the master acted unwisely or improperly, under all circumstances, in coming to this conclusion. Perhaps it was exactly what the owners might have done if they had been personally present. If the owners had so abandoned the voyage, being personally present, because their interest would have been injuriously affected by not so doing, what ground could there be to say that the bottomry bond should not be paid?" See also *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 30; *The Dante*, 2 W. Rob. 427; *The Catherine*, 1 Eng. L. & Eq. 679; *The Elephanta*, 9 Eng. L. & Eq. 553; *Thorndike v. Snood*, 11 Pick. 183; *Willis v. Cook*, 10 Mass. 510.

<sup>2</sup> See *Wainwright v. Crawford*, 8 Yeates, 131, 4 Dall. 225. And it is said that the owner is liable for money borrowed in a case of necessity, although the necessity arose by the fault of the master. *Descadillas v. Harris*, 8 Greenl. 298.

makes it a very different thing from bottomry. Still, if the lender, whether by an instrument, or by force of law, has a lien on the ship, it would seem that he has an insurable interest in her. Nor should we be willing to say, that the general rule, that the insurers on bottomry are never responsible if the debt survives, would apply to cases where, either by force of law or the terms of the contract, the owner is still liable.

In practice, the question as to the validity of a bond springs most frequently from the question whether it be invalid by the fault of the master, or by that of the lender; for both of them have by the law-merchant duties to perform in relation to it.

As to the master, he can make a bottomry bond only abroad, and from necessity.<sup>1</sup> "Abroad," in this sense, once meant in a port of a foreign state. It now means, however, that the master cannot bind the ship by bottomry unless he is so far distant from the owner that he cannot communicate with him without a delay which would be injurious.<sup>2</sup>

<sup>1</sup> Sir *William Scott*, in the case of *The Gratitude*, 3 Rob. Adm. 240, 266, speaking of the necessity which will authorize the borrowing of money on bottomry by the master, says: "Necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." See also *The Nelson*, 1 Hagg. Adm. 169; *The Rhadamanthe*, 1 Dods. 201; *The Gauntlet*, 3 W. Rob. 82, and cases, *infra*.

<sup>2</sup> In a case of necessity, where it is impossible to communicate with the owners, the master may give a bond, though the owners reside in the same country. *La Ysabel*, 1 Dods. 273. And in *The Trident*, 1 W. Rob. 29, where the owner had lived in Scotland, it was held that the master might give a bond at Plymouth, England, the owner having died insolvent, and his personal representatives declining to interfere. So, the master may pledge the credit of the owners in a port of the country in which they reside, if no com-

munication can be had with them. *Arthur v. Barton*, 6 M. & W. 138; *Robinson v. Lyall*, 7 Price, 592. But not if a delay for the purpose of communication would work no injury. *Johns v. Simons*, 2 Q. B. 425; *Stonehouse v. Gent*, *Ib.* 431, note; *Beldon v. Campbell*, 6 Exch. 886. In *The Rhadamanthe*, 1 Dods. 201, Sir *William Scott* was of opinion that Cork was a foreign port as respected England, though the point was not decided. And in *The Barbara*, 4 Rob. Adm. 1, Jersey was held a foreign port in regard to London. But these distinctions are now done away with, and the only question is, whether the owner could have been consulted. Thus, in *The Oriental*, 3 W. Rob. 243, the vessel was at New York and the owners at St. Johns, New Brunswick. There was a telegraph between the two places. The master gave a bond without consulting the owners. Dr. *Lushington* held the bond was valid, but on appeal the judgment was reversed. *Wallace v. Fielden*, 7 Moore,

The necessity which justifies him in doing so must be a real necessity, and perhaps a strict necessity. Still it need not be so

P. C. 398. In the case of *The Bonaparte*, 3 W. Rob. 398, a bond was given by the consent of the owners of the vessel on the ship, freight, and cargo. The shipper of the cargo was applied to, but refused to advance any money. It did not appear that the owners of the cargo had been notified. Dr. *Lushington* was of opinion that it was not necessary for the master to consult the owners of the cargo, and pronounced for the bond. On appeal, the privy council remitted the case, to allow evidence to be taken as to what notice, if any, had been given to the owners of the cargo. *Wilkinson v. Wilson*, 8 Moore, P. C. 459, 36 Eng. L. & Eq. 62. The law is stated by the court on pages 70 and 473 respectively, of these reports, as follows: "That it is a universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavor to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." On the case being sent back, further evidence was taken. It appeared that the British consul had writ-

ten, on behalf of the master of the vessel and his agent, to the consignees in England, informing them of the damage sustained by the ship, but making no application for money, nor referring to the necessity for repairs. The letter also requested instructions as to what should be done. No answer was returned. Dr. *Lushington* held that, under these circumstances, the owners of the cargo were bound by the bond. *The Bonaparte*, 20 Eng. L. & Eq. 649. On appeal, his decision was affirmed. 8 Moore, P. C. 459, 483. See also, generally, *The Lochiel*, 2 W. Rob. 34; *The Wave*, 4 Eng. L. & Eq. 589; *Agricultural Bank v. The Bark Jane*, 19 La. 1. In the *Nuova Loanese*, 22 Eng. L. & Eq. 623, 17 Jur. 263, a bottomry bond was granted by the master at the port where the owner of the cargo, who was also the charterer of the ship, resided. Advertisements for the loan were published. This fact was known to the owner of the cargo; and he was also aware that the ship was unseaworthy, and that the cargo had been laden and unladen while the ship was in port. No direct communication or application for advances was made to him. Held, that the bond was invalid as far as his interest was affected. It is true that, in the case of *The William & Emmeline*, 1 Blatchf. & H. Adm. 66, 71, Mr. Justice *Betts* held that Charleston, South Carolina, was a foreign port in respect to New York; yet this case was decided in 1828, when a long time was required for communication between the two cities; and, moreover, though a bond was given in the case, yet it was informal, and the case was decided on the ground that repairs furnished in



stringent and absolute a necessity as we shall see in the chapter on total loss must exist to justify a sale of the ship by the master. We should say that it was a sufficient necessity if it would have induced the owner so to raise the money, if he had been at the place.<sup>1</sup>

The master cannot hypothecate the ship for money borrowed for his own wants;<sup>2</sup> nor for the exclusive benefit of the cargo;<sup>3</sup> nor if he have money or available funds of the owner within his reach; nor if he can borrow the money on the personal credit of the owner, or can get it from any consignee or agent of the owner.<sup>4</sup>

another State constitute a lien on the ship.

<sup>1</sup> *The Fortitude*, 3 Sumn. 228, 246.

<sup>2</sup> *King v. Perry*, 3 Salk. 23. The following case is related by Loccenius, lib. 2, c. 6, § 12: The master of a ship, being in a Spanish port, and having exposed the ship to seizure by his neglect to comply with a particular regulation of the country, entered into an agreement with a person who was supposed to possess sufficient influence to obtain the restitution of the ship, to pay him a very considerable sum, with maritime interest, if he should procure the restitution of the ship, and she should afterwards return home in safety; and, for securing the payment, executed an instrument in the nature of a bottomry bond. By the interest of the person with whom the agreement was made, the ship was restored, and afterwards returned home in safety; and he instituted a suit against the ship upon the instruments executed to him by the master. It was held that neither the ship nor her owners were chargeable. See also *Gibbs v. Schooner Texas*, Crabbe, 236.

<sup>3</sup> *Fontaine v. Col. Ins. Co.*, 9 Johns. 29.

<sup>4</sup> *Tunno v. Ship Mary*, Bee, 120;

*Boreal v. The Golden Rose*, Ib. 131; *Putnam v. Schooner Polly*, Ib. 157; *Swan v. Ship A. E. I.*, Ib. 250; *Forbes v. The Hannah*, Ib. 348; *S. C. Hopkins*, 176; *Canizares v. The Santissima Trinidad*, Bee, 353; *S. C. Hopkins*, 185; *Rucher v. Conyngham*, 2 Pet. Adm. 295; *Cupisino v. Perez*, 2 Dall, 194; *The Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *The Ship Packet*, 3 Mason, 255; *Ross v. The Ship Active*, 2 Wash. C. C. 226; *Walden v. Chamberlain*, 3 Wash. C. C. 290; *Patton v. The Randolph*, Gilpin, 457; *The Nelson*, 1 Hagg. Adm. 169; *The Rhadamanthe*, 1 Dods. 201; *The Sydney Cove*, 2 Dods. 1, 7. In the case of *The Virgin*, 8 Pet. 538, the court held, that, if the necessity for the supplies and the advances is once made out, it is incumbent upon the owners, who insist that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It was also held that it was not enough to show that there were funds at the port of distress which ought to have been appropriated to the use of the ship, and that the master was justified in giving a bond if he could not obtain them, because "the non-exist-



It is a question whether he can hypothecate the ship if he has funds of his own. But we see no sufficient reason why he should be under a compulsion to lend his own money to his owner, under all circumstances.<sup>1</sup> If he have money on board which belongs to shippers, it may be doubted whether he has a right to use their money for the exclusive benefit of the ship, as he certainly cannot hypothecate the ship for the exclusive benefit of the cargo. We suppose it to be quite certain that he would not be bound to use the money of the shippers.<sup>2</sup> It has been held that he may give this

ence of funds, and the non-ability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress.

<sup>1</sup> In the case of *The Ship Packet*, 3 Mason, 255, 263, Mr. Justice Story said: "If the master has money of his own on board sufficient for the ship's necessities, it is by no means certain that he has a right in such a case to resort to the extraordinary measure of bottomry. In case of there being money of the owner of the ship on board, it is very clear that he cannot resort to bottomry. And although I would not absolutely decide that under no circumstances he could so resort, where he has sufficient money of his own on board, yet, if he can, it must be in a case of a very peculiar character, and such as ought to induce the court to uphold it from great public principles." In *Canizares v. The Santissima Trinidad*, Bee, Adm. 353, the master had goods of his own on board, and could also have procured money from the intendant at the port of distress. Held, that he had no authority to give a bond. Same case on appeal, *Cupisino v. Perez*, 2 Dall. 194. But if this latter element had been wanting, we think that a bond given by him would be valid. See *The William and Emmeline*, 1 Blatchf. & H. Adm. 66, 72.

<sup>2</sup> In *The Ship Packet*, in the preced-

ing note, it was objected that the master should not have given a bond, as he had specie dollars on board which belonged to some of the shippers. Mr. Justice Story said, page 258: "The general principle is that he (the master) is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable. If he has money on board, and the use of it will be the least sacrifice, he ought to resort to it in the first instance. But there may be cases in which the use of such money would be the greatest sacrifice that could be made, and the whole object of profit in the voyage might be thereby defeated. Suppose a voyage to the East Indies or China, in which the principal outward property on board is Spanish dollars, and a disaster on the first passage, requiring repairs, the use of those dollars may be the most mischievous exercise of his discretion and destroy the hopes of the voyage. . . . In all these cases, therefore, much must be left to the master's discretion, and he must exercise it conscientiously for the general interest. If he acts *bona fide* and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found that he had committed an error in judgment, and might have acted more beneficially in another manner."

bond to a consul of the country to which the ship belongs, for services rendered by him in a foreign port.<sup>1</sup>

It may be added that the power of making a bottomry bond of the ship belongs not only to the master originally appointed by the owners, but to any one who is lawfully master of the ship, however appointed.<sup>2</sup>

Let us now look at the duty of the lender on bottomry, and ascertain the prerequisites necessary on his part to make the bond valid. Because, as we have already said, if it be not valid it can give him no insurable interest, and the question of its validity may therefore come up between the lender and his insurers, as well as between the lender and the ship-owner.

It seems to be agreed that there must not only be a necessity which justifies the master in making the bond, but that the lender must ascertain at his own risk that this necessity exists.<sup>3</sup> Courts

<sup>1</sup> The Zodiac, 1 Hagg. Adm. 320. See also The Cynthia, 20 Eng. L. & Eq. 623.

<sup>2</sup> The Orelia, 3 Hagg. Adm. 75; The Boston, 1 Blatchf. & H. Adm. 309; The Kennersly Castle, 3 Hagg. Adm. 1. In this case it was doubtful whether the master was appointed by the agent of the owner, or by the agent of the underwriters, to whom the ship had been abandoned, or by both. The court were also inclined to the opinion that if he had been appointed by the underwriters alone the bond would have been valid.

<sup>3</sup> Putnam v. Schooner Polly, Bee, Adm. 157; Gibbs v. Schooner Texas, Crabbe, 236; The Aurora, 1 Wheat. 96; The Boston, 1 Blatchf. & H. Adm. 309, 324; The Orelia, 3 Hagg. Adm. 75, 84; Heathorn v. Darling, 1 Moore, P. C. 5; The Royal Stuart, 33 Eng. L. & Eq. 602. In Walden v. Chamberlain, 3 Wash. C. C. 290, it was held that the lender on bottomry ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage, and that the necessity for such advances, or that

they were made on the credit of the vessel, was never to be presumed. In Soares v. Rahn, 3 Moore, P. C. 1, S. C. The Prince of Saxe-Coburg, 3 Hagg. Adm. 387, the bond was given by the master, who was also a part owner. The agent of the charterer, and sole owner of the cargo, was ready and willing to advance money. The bond-holders were not aware of this, but they had made no inquiries in regard to it. The bond was pronounced invalid, though the holders were the lowest bidders at the auction advertised by the master. The court said: "If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached, or invalidated, because it might happen that, notwithstanding his reasonable and *bona fide* inquiries, the repairs were not necessary, or the money might have been had on personal credit." But although he is bound to show a reasonable case of unprovided necessity for

have sometimes held very strong language on this subject, stronger perhaps in this country than in England. We should say, however, that it is enough if the foreign merchant makes due inquiry, and thereupon has reasonable grounds for believing that the necessity exists. And it has been distinctly held in England, that he is obliged to make this inquiry in regard to the necessity of the ship alone, without reference to the interests of the owner. It is hardly necessary to add, that, if the master be in any way fraudulent in making the bond, this avoids the bond as to the lender, if he has participation in, or knowledge of, the fraud,<sup>1</sup> and not otherwise.<sup>2</sup> Nor is the lender bound to see that the master applies the funds thus raised to the ship's necessities.<sup>3</sup> If the lender owes the owner, he must apply the amount of the debt to the necessity of the ship, and cannot take a bottomry bond upon it.<sup>4</sup> Where the master has power to take the ship on a new voyage, the bond would be good by which he raised the funds necessary for the purpose.<sup>5</sup> But if a

the advance, yet he is not bound to inquire into the expediency of incurring the expense of the repairs with reference to the interest of the owner. *Duncan v. Benson*, 1 Exch. 537, 555; *The Vibilia*, 1 W. Rob. 610. In the case of *The Brig Bridgewater*, Olcott, Adm. 35, it was held, that, in an action on a bond, the production and proof of the execution of it will not entitle the holder to a decree in his favor, but he must show that a necessity existed for the expenditures, and he should exhibit an account of the items of expense, etc. See also *Clark v. Laidlaw*, 4 Rob. La. 345; *The William and Emmeline*, 1 Blatchf. & H. Adm. 66, 76; *Thomas v. Osborn*, 19 How. 22, 36.

<sup>1</sup> *The Nelson*, 1 Hagg. Adm. 169, 176; *The Tartar*, Ib. 1, 14; *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340; .S. C. affirmed on appeal, *Carrington v. Pratt*, 18 How. 63.

<sup>2</sup> *Atlantic Ins. Co. v. Conrad*, 4 Wash. C. C. 662, 1 Pet. 381.

<sup>3</sup> *Scarborough v. Lyons*, Latch. 252, Noy, 95, 14 Vin. Ab. Hyph. (A.) pl. 2;

*The Ship Fortitude*, 3 Sumn. 228; *Conrad v. Atlantic Insurance Co.*, 1 Pet. 386, 437; *The Virgin*, 8 Pet. 538, 553; *The Orelia*, 3 Hagg. Adm. 75, 84; *The Jane*, 1 Dodd. 461, 464; *The Royal Stuart*, 33 Eng. L. & Eq. 602.

<sup>4</sup> *Rucher v. Conyngham*, 2 Pet. Adm. 295; *The Aurora*, 1 Wheat. 96; *Hurry v. The Ship John and Alice*, 1 Wash. C. C. 293; *The Hebe*, 2 W. Rob. 146.

<sup>5</sup> *The Virgin*, 8 Pet. 538, 552; *The Hunter, Ware*, 249, 253. See also *The Tartar*, 1 Hagg. Adm. 1; *The Mary Ann*, 4 Notes of Cases, 376, 381, 10 Jur. 253. In *The Reliance*, 3 Hagg. Adm. 66, the ship was freighted from London to Calcutta and back. The agents there, upon whom the master had a limited credit, which he had exhausted, induced the master to undertake a series of voyages in defiance of the owners' instructions. The bond was given for advances made on one of these voyages. Held, that it was void; for, if a necessity existed, it arose from the conduct of the parties in whose favor it was given.

lender connived with the master to send a ship on a new voyage, which the owner has not authorized, the lender now himself creates the necessity, and a bond to him is invalid.<sup>1</sup>

We give in our notes instances which will illustrate what purposes of the master in so raising money are sufficient to make the bond valid, and what are not.<sup>2</sup>

<sup>1</sup> See note 5 on preceding page, and cases there cited.

<sup>2</sup> If the master order supplies, and they are rendered, and repairs made, and the bottomry bond given afterwards, this bond is good if it was originally intended to furnish the supplies on the credit of the ship, and to secure this by a bottomry bond. *The Virgin*, 8 Pet. 551, 552; *La Ysabel*, 1 Dods. 273, 276; *The Augusta*, 1 Dods. 283; *The Alexander*, 1 Dods. 278, 280; *The St. Catherine*, 3 Hagg. Adm. 250; *The Rubicon*, 3 Hagg. Adm. 9; *Furniss v. Brig Magoun*, Olcott, Adm. 53, 63; *The Ship Panama*, Olcott, Adm. 343, 350. In the case of *The Vibilia*, 1 W. Rob. 1, it was held, that, where advances were made on the personal credit of the master or owners, and a bond subsequently given, the bond was void; but that where advances had been made, without direct evidence as to any original understanding or contract, and followed by a bond, the law presumes that a bond was contemplated in the first instance. In the case of *The Trident*, 1 W. Rob. 29, on the arrival of the vessel at the port of distress, it was necessary to defray certain minor expenses, such as pilotage dues, &c. These were paid by a firm there without any contemplation of a bottomry bond. Subsequently, further expenditures being required, the same parties were applied to, but refused to advance more money unless a bond was given. This was done for the whole amount, including the sum first advanced. The bond was

held valid *in toto*. See also *Smith v. Gould*, 4 Moore, P. C. 21. In *The Gauntlet*, 3 W. Rob. 82, when the vessel arrived at the intermediate port, the crew were in a state of mutiny, and the master dispossessed of his command. The authorities of the port took the master and crew on shore, and kept them in close confinement. It was held that a bond given for the expenses incurred by a person employed by the British vice-consul to investigate the mutiny, and re-invest the master in his command, was valid, although no mention was made of a bond at the outset of the inquiry, and the bond was taken immediately before the vessel sailed from the port. The court said: "In the course of the argument it was pressed upon the court, that when Mr. Jeffries first stepped forward to render his assistance, there was no express mention that he was to be reimbursed by a bond of bottomry. I do not think that this fact, under the peculiar circumstances of the case, can invalidate the subsequent bottomry transaction. It is very true, that upon general principles, where work has been done or advances made upon personal security in the first instance, the party doing the work, or making the advances, is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; but what is the case here? The expenses incurred by this vessel, and for which this bond was given, were incurred when the master was out of possession of the ship,

There is no salvage or general average upon a bottomry bond ;<sup>1</sup> unless the contract provides that the bond-holder shall contribute

and when he was incompetent to take charge of her, or do anything in her behalf." But if supplies be furnished or repairs made, when the original purpose and understanding were to furnish them upon the personal credit of the master, or of the owner, either or both, without reference to the ship, it would seem to be settled that the bargain cannot be changed, and a bottomry bond given for this existing debt with extra interest. *The Hunter*, Ware's Rep. 249; *Sloan v. Ship A. E. L. Bee*, Adm. 250; *Rucher v. Conyngham*, 2 Pet. Adm. 295; *The Augusta*, 1 Dods. 283; *The Hero*, 2 Dods. 139, 147; *The Hersey*, 3 Hagg. Adm. 404, affirmed *Gore v. Gardiner*, 3 Moore, P. C. 79; *The Wave*, 4 Eng. L. & Eq. 589. See also *The Ariadne*, 1 W. Rob. 411, 419. If, however, the ship should be held in the foreign port for this debt, and there was no way of liberating her but by this bottomry, we should say that it would be valid if made in good faith. In *The Aurora*, 1 Wheat. 96, Mr. Justice Story said: "It is undoubtedly true, that material-men, and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right. And it must be admitted that, in such a case, a *bona fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the

master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest." The point, however, was not decided. In *The Vibilia*, 1 W. Rob. 1, it was held that the fact that a lien existed on the ship by the law of the country in which the bond was given was an important ingredient, and furnished a presumption in favor of bottomry, and against personal credit. But we are not inclined to carry the law further than this, and to say that in all cases the arrest of the ship for debt would authorize the giving of a bond by the master. In *The Aurora*, above cited, it was held that a mere threat to arrest the ship for a pre-existing debt would not justify the master in giving a bond. See also *The Boston*, 1 Blatchf. & H. Adm. 309, 324. It is true that in the case of *Smith v. Gould*, 4 Moore, P. C. 21, Lord Campbell used language which is inconsistent with this view of the case. The vessel, bound for New York, had a very long passage, and, having got out of water, the persons on board used some cases of porter belonging to a freighter. On arrival the consignee threatened to sue the ship for the non-delivery. The captain raised money, to pay for the damage done, by the bond on which this suit was brought. It did not appear in evidence whether by the laws of New York the ship could have been arrested, and the bond was pronounced to be void. But Lord Campbell expressed his opinion

<sup>1</sup> *Joyce v. Williamson*, 3 Doug. 164. See also *Walpole v. Ewer*, Park, Ins. 565, per Lord Kenyon, C. J.; *Robertson v. United Ins. Co.*, 2 Johns. Cases, 250, 252, per Kent, J. By the ordinance of Hamburg, the lender does not contrib-

ute to general average. Tit. 2, Art. 2; 2 Magens, No. 931. In France the law is the other way. Code de Commerce, n. 141; Le Guidon, c. 19, art. 5. So in Denmark. *Walpole v. Ewer*, Park, Ins. 565.

to the general average of the ship;<sup>1</sup> and this is now common, on the ground that the ship is his security. If there be such a pro-

that a master might hypothecate his vessel in any case where it might be arrested and sold for a demand for which the owner would be liable. The whole subject was discussed at great length by Dr. *Lushington* in the case of *The Osmanli*, 3 W. Rob. 198, and a conclusion contrary to that of Mr. Justice *Story* arrived at. The *Osmanli* was arrested for debts due from her owner on account of advances made for *The Osmanli*, and for other ships of the same owner on former voyages. The arrest was legal in all respects, though of course the ultimate consequences of it could not be determined. The captain borrowed money on bottomry to release the vessel, the lender knowing it was to be so applied. The bond was held to be invalid. In *The Augusta*, 1 Dods. 283, 288, Lord *Stowell* remarked: "It has been said that the party might, by the law of Russia, have detained this ship till the money was repaid; but I do not think that circumstance alone will be sufficient to convert that into a case of hypothecation. Ships might, in all cases, be detained on the same ground by the general law of Europe; and if the position which has been laid down were to be supported, it would go the length of turning every case into a case of hypothecation, or at least there would be a necessity of inquiring, in every case, into the state of the foreign law." However the law may be in regard to the arrest of the ship, it is clear that the fact of the master's being arrested will not be sufficient to authorize the giving of a bond, to raise money to procure his release, although he was arrested for a debt contracted for the vessel in his capacity as master. *Smith v. Gould*, 4

Moore, P. C. 21. See also *The Aurora*, 1 Wheat. 96. It is obvious that these questions can only arise in regard to old debts. For if advances are made to the ship, they are either on the credit of the ship, or of the master or owner. If the latter, the ship could not be legally arrested, and if illegally, it is clear that no necessity would exist for the giving of a bond. If they are made on the credit of the ship, we have seen that a bond is valid, although given subsequently. The case of *The Osmanli* proceeds on the ground that, as the master has no right to bottomry for old debts, so he has not the right when the ship is arrested for those debts. So we hold, generally, that if the liberation of the ship from arrest for debt is a good cause for bottomry, yet, if the attaching creditor is himself the obligee, the bond is invalid. Thus, Mr. Justice *Story* in the case of *The Aurora*, 1 Wheat. 96, 105, said: "Nor does it by any means follow that, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a general creditor would be entitled to acquire a like interest. It would seem against the policy of the law to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country."

<sup>1</sup> *Insurance Co. of Penn. v. Duval*, 8 S. & R. 138.



vision, he is himself entitled to contribution and to salvage, and contributes only on the value of the property hypothecated, without the addition of maritime interest.<sup>1</sup>

We shall see in the chapter on total loss that an owner may sell a wrecked or injured ship, because her repairs would cost more than she would be worth, and then by abandonment make this a total loss, as against his insurers. But there is no such thing as abandonment in this sense to a bottomry bond-holder, and the owner cannot therefore make a constructive total loss as against him in this way.<sup>2</sup>

Security additional to the bond may be given to the lender, and it still remains a valid bottomry bond, justifying maritime interest, provided the additional security conforms to the original of the bond itself; that is to say, is of no avail to the lender if the ship be lost.<sup>3</sup> If, however, this security is available to the lender, although the ship be lost, as his debt can no longer be considered subject to the perils of the sea, he would have no insurable interest in it, unless the terms of the contract would reduce it to a mortgage, making the owner liable at all events, and giving the ship to the lender as security for the debt. For as a bottomry bond may be good in part, and bad in part, it might be that such security would reach but a part of the debt, leaving an insurable interest in the remainder. In practice the ship is usually sufficient security and the only security, and the bonds are commonly so expressed as to limit the lender to the security of the ship, and authorize the owner to surrender the ship to the lender, without further personal responsibility to the owner.<sup>4</sup> It is obvious that

<sup>1</sup> *Gibson v. Philadelphia Ins. Co.*, 1 Binn. 405.

<sup>2</sup> *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 30; *The Elephanta*, 9 Eng. L. & Eq. 553; *The Dante*, 2 W. Rob. 427; *Ins. Co. of Penn. v. Duval*, 8 S. & R. 138; *Pope v. Nickerson*, 3 Story, 465.

<sup>3</sup> *The Jane*, 1 Dods. 461, 466; *The Tartar*, 1 Hagg. Adm. 1; *The Nelson*, 1 Hagg. Adm. 169, 179; *The Kennersley Castle*, 3 Hagg. Adm. 1; *The St. Catherine*, 3 Hagg. Adm. 250; *The Emancipation*, 1 W. Rob. 124, 129;

*The Ariadne*, 1 W. Rob. 411, 421; *The Lord Cochrane*, 2 W. Robb. 320; *The Hunter, Ware*, 249; *The Schooner Zephyr*, 3 Mason, 341; *Leland v. The Ship Medora*, 2 Woodb. & M. 92, 100; *Greeley v. Smith*, 3 Woodb. & M. 236; *The Brig Atlantic*, 1 Newb. Adm. 514. So, if property is mortgaged to secure a bottomry bond, the mortgage is defeated by whatever avoids the bond. *Thorndike v. Stone*, 11 Pick. 183; *Bray v. Bates*, 9 Met. 237.

<sup>4</sup> The eighteenth rule of practice in the Admiralty, prescribed by the Su-



the ship may arrive safely, and yet so much damaged by a peril of the sea as to have lost much of its value. And if the terms of the contract cast this loss on the lender, he would have an insurable interest against it.

A bottomry bond of the ship does not necessarily hypothecate the freight also;<sup>1</sup> but whatever power the master has over the ship, he has over the freight; and whatever circumstances would justify him in hypothecating the ship will justify him in hypothecating the freight.<sup>2</sup> It is quite common to hypothecate both ship and freight in the same bond. A general hypothecation of the freight will cover the freight for the whole voyage, whether it be earned before or after the hypothecation,<sup>3</sup> provided only that it has not been paid to the master or the owner.<sup>4</sup> And the circumstances of the case may be such as to include the freight of a subsequent voyage.<sup>5</sup> Where charterers of a whole ship permit sub-shippers to fill up space which the charterers do not want,

preme Court, is as follows: "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only, against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, in which latter case the suit may be *in personam* against the wrong-doer." If an end is put to the voyage by the fraudulent act of the master, it would seem, therefore, that, if no proceeds of the ship or cargo can be got at, the only remedy is against the master. See *The Brig Ann C. Pratt*, 1 Curtis, 351, per Curtis, J. Although, if the owner by his own act prevents the ship from arriving, then he is personally liable, as has been already said.

<sup>1</sup> *La Constancia*, 4 Notes of Cases, 285; *The Mary Ann*, 4 Notes of Cases, 376, 383, 10 Jur. 253. See also *The Draco*, 2 Sumn. 157; *Crawford v. The William Penn*, 3 Wash. C. C. 484.

<sup>2</sup> *The Gratitude*, 3 Rob. Adm. 240, 274; *The Nelson*, 1 Hagg. Adm. 169; *The Augusta*, 1 Dods. 283; *Murray v. Lazarus*, 1 Paine, C. C. 572; *The Ship Packet*, 3 Mason, 255.

<sup>3</sup> *The Schooner Zephyr*, 3 Mason, 341. In *The Jacob*, 4 Rob. Adm. 245, the freight of a subsequent voyage was, under the circumstances of the case, held liable for the bond. The freight is liable to contribute *pro rata* with the ship, although the freight belongs to different persons. *The Dowthorpe*, 2 W. Rob. 73. And freight earned from sub-shippers of goods by permission of the charterers of the whole ship is liable, as against them, in payment of a bottomry bond given at the port of the charterers, for advances subsequent to the charter-party. *The Eliza*, 3 Hagg. Adm. 87.

<sup>4</sup> *The John*, 3 W. Rob. 170. See also *The Cynthia*, 20 Eng. L. & Eq. 625.

<sup>5</sup> See *The Jacob*, 4 Rob. Adm. 245, *supra*.

these shippers must pay their freight to the charterer or owner as the bargain may be. It is nothing to them if the ship is hypothecated with the freight, so that they must pay their freight to the lender on the ship; and it has been held that, in such case, the freight is bound to the payment of the bottomry<sup>1</sup> bond, and of course the lender would have an insurable interest in this freight.

The lender on bottomry or respondentia has an insurable interest in the whole maritime interest to be paid to him; for this stands at the same risk as the principal.

We have thus far spoken only of the insurable interest of the lender on bottomry or respondentia. But the lender assumes certain risks, and it is against these risks only that he has an in-

<sup>1</sup> *The Eliza*, 3 Hagg. Adm. 87. The facts in this case were: The vessel while at Hobart Town wanted repairs and necessities; and expenses beyond the means of the master were incurred. At Hobart Town the ship was chartered by K. & W. for the voyage home for £1,200, and this sum was paid to the master, who applied it to the ship's account; it was, however, insufficient to pay all the demands against the ship. The charterers declining to advance money on bottomry or otherwise, the master procured it of other merchants. The charterers allowed various persons to ship goods at sub-freights; and upon the arrest of the ship and freights in discharge of the bottomry bond, the several consignees of these goods paid in their amount of freight. The court say: "On the part of the charterers, it is said that the ship made no freight home; that all these sub-freights were earned for, and belonged to, the charterers, and not to the ship. The argument is specious; and were the question only with the ship-owners, it might be successful; but the question is with the bottomry bond-holders; and they maintain, that, but for the bond, no part of the freight, neither for the charterers

nor sub-shippers, would have been earned. The master states in his affidavit that he would have been obliged to sell the ship to liquidate his debts and engagements on her account. Suppose that when the ship sailed, not only the freight, but the ship itself, had been hypothecated to the charterers, and, in the course of her voyage, the master had been compelled to resort to another bottomry bond, the latter bond, it is admitted, would have the priority. If I am not mistaken, the same doctrine has been held in respect of two bonds given at the same port. *The Betsey*, 1 Dods. 289. The bottomry lenders in this case were no parties to the chartering; they might be altogether ignorant of the existence of the charter-party; and they took the security of the ship and freight in the ordinary mode, upon an advance on bottomry. Considering, then, that the sum so advanced was necessary to enable the ship to bring home even the charterer's goods, and that freight was earned from the sub-shippers, I am of opinion that it is liable to the bond-holders, and that the remaining proceeds belong to them, and not to the charterers."

insurable interest. The contract may divide the risks, leaving some with the owner and some with the lender. The lender then has his insurable interest against the risks which he assumes, and the owner has his insurable interest against the risks which are left with him. But most usually the lender assumes all the risks of the perils of the sea, — that is, all those risks against which marine insurers insure. The insurer therefore has no insurable interest left, except in that part of the value of the ship or goods which is over and above the amount for which they are hypothecated.<sup>1</sup> If they are hypothecated to their full value and are lost, he has received their value and has no part of it to refund. That he would have no insurable interest in ship or goods except for the value not hypothecated would result from the principles of the law of insurance; but this is expressly provided in an English statute as to East India voyages.<sup>2</sup>

#### SECTION VIII. — *The Insurable Interest of a Mortgagee.*

WE have already seen that a mortgagor or a mortgagee possesses an insurable interest. A mortgagee, however, has two distinct resources: one of them is his personal claim on his creditor for his debt; the other is the security of the property mortgaged him. If he insures this property against a peril of the sea to the full amount of his debt, as he certainly may,<sup>3</sup> and it be lost, and he recovers the sum insured from his insurers, and still retains for his own benefit this claim against his creditor, it is plain that his debt is paid to him twice, if the creditor be solvent. It is quite as plain that the creditor cannot say to the mortgagee that the insurers have paid his debt for him, and that the mortgagee has no further claim on him, unless the insurance was expressly at the expense of, and for the benefit of, the mortgagor. And the mortgagee cannot insure either his own interest or the whole value of

<sup>1</sup> See *Williams v. Smith*, 2 Caines, 13.

<sup>2</sup> The statute of 19 George II. c. 37, limits the insurable interest of the owner of an hypothecated ship or goods bound on an East India voyage to "the value of his interest in the ship,

or in the goods on board, exclusive of the money so borrowed."

<sup>3</sup> *Smith v. Lacelles*, 2 T. R. 187; *Irving v. Richardson*, 2 B. & Ad. 193, 1 Moody & R. 153; *Traders' Ins. Co. v. Roberts*, 9 Wend. 404.

the property and charge the premium to the mortgagor, if it be no part of the contract that the insurance shall be at the expense of the mortgagor, or if he is not privy to the insurance, and makes himself a party.<sup>1</sup> But we believe it to be an ancient, established, and rea-

<sup>1</sup> *Dobson v. Land*, 8 Hare, 216, 18 Law Reporter, 247; *White v. Brown*, 2 Cush. 412, 415. The insurable interest of the mortgagee was confined to the amount of the mortgage debt. Per *Story, J.*, in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 502; per *Gibson, C. J.*, in *Smith v. Columbia Ins. Co.*, 17 Penn. State, 253, 260. It has also been held in a late case in Pennsylvania, that a mortgagee who has insured the mortgaged property cannot recover of the insurer, unless the security is impaired, — at least not without transferring the mortgage. It is, however, one question whether the assurer is bound to pay a loss, although the remaining security is ample; another, whether, if he is called upon to pay such loss, he can require a transfer of the mortgage itself; and it is still another question whether he can demand an assignment of the debts to secure which the mortgage was given. In *Smith v. Columbia Ins. Co.*, 17 Penn. State, 253, it was held that a mortgagee insured was bound to communicate to the insurers the fact that he held prior encumbrances on the same property, on the ground that they would diminish the amount of property to which the insurers would have a right to resort in case they paid a loss; that, not having done so, he could not recover without assigning to the insurers all the mortgages held by him on the property insured. *Gibson, C. J.*, said: "Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the

property, but only so much as may be enough to satisfy his mortgage. It is not the specific property which is insured, but its capacity to pay the mortgage debt. In effect, the security is insured. The fallacy of the argument on the part of the plaintiff below is in assuming that the words in the policy, 'to pay, make good, and satisfy all such damages or loss which shall or may happen by fire to the property,' bind the insurer to pay in every case to the extent of an outside price, for which it might be sold unencumbered in the market. What is the property insured? Not the thing independent of the ownership; for, if the law were otherwise, the policy might to some extent be a wagering one. The beneficial interest in it is insured, and only to the value of it can an owner recover for the loss of it, because the contract of insurance is strictly a contract of indemnity. No one would pretend that the mortgagee of a house, who had insured it, could recover for the burning of a few shingles in the roof of it, though the unimpaired value of the building might be much greater than the amount of the mortgage. . . . The insurer, having paid the mortgage debt, is entitled to have recourse to the mortgage property; and any concealment of facts which would lessen its value would be an injury to him. That he is entitled to a cession of the security is proved by analogies from marine insurance, from fire insurance, in respect to recourse to the hundred, and from the contract of suretyship." In *Kernochan v. New York Bowery Fire Ins. Co.*, 5 Duer, 1,

sonable rule that the insurers, by paying that loss, become entitled by a species of subrogation to the insured's claim on the mortgagor. If he be solvent it is their gain ; if insolvent, their loss. We do not know any cases of marine insurance which would bring this rule into question. Recent decisions in Massachusetts,<sup>1</sup> on fire policies, have taken very different ground, permitting the mortgagees to recover from the insurers, and still hold for their own benefit their claim against the mortgagor. The facts in those cases were somewhat peculiar, and the difference between marine insurance and fire insurance may be sufficient to leave the rule, as we have stated it, in force as to marine policies, although a different rule should be adopted as to fire policies. We cannot but think that the contract of marine insurance is a contract of indemnity.<sup>2</sup> And we

17 New York, 428, it was held that, in the event of a total loss, the mortgagee is entitled to recover the whole sum insured, provided it does not exceed the amount due on the mortgage at the time of the loss; and evidence is not admissible to show that, notwithstanding the loss, the mortgaged premises continued to be a full security for the debt. This was decided on the ground that the insurer is entitled to be subrogated to the rights of the mortgagee; and, therefore, it was also held, that the mortgagee is bound to disclose if he has made any transfer of the mortgage securities which would impair the rights of the insurer. We prefer the doctrine of these cases to that of *King v. State Mutual Ins. Co.*, 7 Cush. 1. See also *Foster v. Equitable Mutual Fire Ins. Co.*, 2 Gray, 216, where it was expressly decided that the mortgagee's right to recover on the policy is not affected by the repair of the loss by the owner of the equity of redemption. Where the interest of the insured is not that of a mortgagee, but of one having a lien, it would seem to be clearly opposed to the spirit of the contract of insurance to hold the insurers liable for a loss which does not in any way impair the security.

Thus, A, having property of B in his hands to the amount of \$ 20,000, upon which he has made advances to the amount of \$ 5,000, insures that amount upon the property. A loss to the amount of \$ 5,000 happens. The assured has still in his possession property of the value of \$ 15,000. Can it be said that a loss within the meaning and spirit of the contract of insurance has happened to the assured? Owing to the fact that the losses in the case of liens have been total losses, this question has received but slight attention. The better view would seem to be, that the assured could have no claim upon the insurers unless the property were totally destroyed, or reduced in value below the amount for which the assured had a lien. In the latter case the assured could only recover for so much as the property saved fell short in value of the amount of the lien, and he would be bound to transfer a proportionate part of the debt.

<sup>1</sup> *King v. State Mutual Ins. Co.*, 7 Cush. 1; *Foster v. Equitable Ins. Co.*, 2 Gray, 216.

<sup>2</sup> See *Le Guidon*, c. 1, art. 1; *Emerigon*, c. 1, Meredith's ed. p. 2; *Roccus*, Ingersoll's ed. 85; *Nelson v. Suffolk*

believe this principle lies at the very foundation of the law of marine insurance. We should be disposed to apply this principle to every case of marine insurance, where the insurable interest was a lien of any kind upon the property insured as security for a debt. It is only as such security that the insured has any interest whatever in the property. If the debt be paid, his interest dies at once, he can have no loss, and therefore he can have no claim for indemnity against a loss. If the property be injured and its value lessened, his security would be lessened, and this would be a loss against which he might reasonably ask for indemnity. But the property might be damaged very much, and yet remain of sufficient value to make his debt perfectly secure. Here he would have sustained no loss. "It is not the specific property that is insured," says Gibson, C. J., "but its capacity to pay the mortgage debt," and in the case last supposed the capacity is not lost or impaired. We are not prepared to say that wherever the insured interest is a lien, the insurers may interpose, as a bar to a claim for a loss, the remaining sufficiency of the property to pay the debt. But we think the views above presented would tend to the conclusion, that, if insurers pay such a loss, they are entitled to a *pro tanto* transfer of the debt. We give below the numerous and conflicting cases on this subject.<sup>1</sup>

Ins. Co., 8 Cush. 477, 490; *Smith v. Columbia Ins. Co.*, 17 Penn. State, 253, 260; per *Gibson*, C. J.

<sup>1</sup> The nature and extent of the insurable interest of a mortgagee, or of one having a lien, and the legal rights of the insurers and the assured have not been satisfactorily defined. It may be laid down as settled law, that where a mortgagee, or one having a lien, insures his own interest in property, a payment of a loss to him by the insurers does not discharge the debt for which the mortgage or lien is the security. The want of privity between the mortgagors and the insurers is a conclusive objection to the mortgagors' claim to such a discharge. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 397, per *Waltham*, Chancellor; *Carpenter v. Provi-*

*dence Washington Insurance Co.*, 10 Pet. 495, 501, per *Story*, J.; *White v. Brown*, 2 Cush. 412; *King v. State Mutual Fire Ins. Co.*, 7 Cush. 1, 4, per *Shaw*, C. J. See also *Humphrey v. Arabin, Lloyd, & Goold*, temp. Plunk. 318; *Hart v. Western Railroad Corporation*, 13 Met. 99. Where, however, the mortgagee is trustee for the mortgagor, as where the mortgagor causes insurance to be made on the premises payable to the mortgagee in case of loss, or where the mortgagee effects insurance at the expense of the mortgagor with his consent, payment by the insurers would go in discharge for the debt. *Ex parte Andrews*, 2 Rose, 410; *Dobson v. Land*, 8 Hare, 216, 13 Law Reporter, 247; *King v. State Mutual F. Ins. Co.*, 7 Cush. 1, per *Shaw*, C. J.;



SECTION IX. — *Other Insurable Interests.*

ANY one who has agreed to bear certain risks, and indemnify some other party against them, may cause himself to be insured

*Fowley v. Palmer*, 5 Gray, 549. Another, and a more difficult question is, whether, where the insurers, upon the payment of a loss to a mortgagee, who had insured for his own benefit, and paid the premium out of his own funds, demand a transfer of a corresponding part of the mortgage debt, this want of privity can be conclusively urged against their demand. The case of *King v. State Mut. F. Ins. Co.*, 7 Cush. 1, takes very strong ground in favor of the affirmative of this question. In this case a mortgagee insured his interest in the property mortgaged, without describing the nature of his interest. Upon the happening of a loss, the mortgagee was permitted to recover of the insurers without assigning the mortgage debt. *Shaw*, C. J., in delivering the opinion of the court, said: "The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *prima facie*, a good right to recover; and having the same insurable interest at the time of the loss which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable, that the defendants have no claim until such money is recovered, if at all; and therefore that they have no right to demand the partial transfer of the mortgage debt by them required, as a condition to their

liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the case having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought best to consider the question now. We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part, but he has still a right to recover his whole debt of the mortgagor." This decision seems to run counter to what has been the general opinion in respect to the rights of the insurers and the insured, where the interest covered is a mortgage interest. It would seem, also, to be opposed to correct views of the nature of the contract of insurance as being a contract of indemnity. It will be seen that the court confine their decision to the case where the mortgagee insures generally, without specifying the nature of his interest. We think, however, that whether the interest is specified or not, the insurer, upon the payment of a loss, is entitled to have secured to him the debt of the mortgagor, or some portion of it, corresponding to the amount insured. There would seem to be no sufficient reason why a distinction



against those risks;<sup>1</sup> this subject we shall consider more particularly under re-insurance. A vendor has a lien on goods sold

should be drawn between the two cases where the mortgage interest is specified and where it is not. Where the mortgagee insures as such, why, if the doctrine of *King v. State Mut. Fire Ins. Co.* is sound, should it not be held, as in that case, that the mortgage debt merely determines the amount beyond which the insurers cannot be held liable? The mere specification of the nature of the interest would not seem to be a sufficient reason for holding that the contract of insurance was made with reference to the mortgage security in such a sense as to give a right to the insurers to demand a transfer of the debt. If this be not so, a concealment of the nature of the title would enlarge the rights of the assured, and place him in a better condition. The solution of this entire question depends upon the construction to be given to the contract of insurance. Is the engagement of the insurers to answer to the assured (whether the interest is specified or not) for any and every loss by a peril insured against, to the extent of the

mortgage debt; or, in other words, does the mortgage debt merely fix the limit beyond which the insurers cannot be held liable, leaving the rights and liabilities of the parties in all other respects the same as if the assured were owners of the entire estate; or is the engagement of the insurer merely to stand in the place of the assured, and to incur the same risk as he is incurring? The latter is the view that we take of the contract. The mortgagee's motive in insuring is to preserve his security, and the insurance must be construed to be made with express reference to the mortgage interest, whether specified or not. The mortgagee runs no risk as to the debt itself, apart from the security, which the insurers are not also running, provided they have a right of claiming a transfer of the debt. To say there is no privity between the mortgagor and the insurer, does not solve the difficulty. There clearly is no privity, and therefore, as we have seen, the mortgagor cannot claim the benefit of

<sup>1</sup> *Reed v. Cole*, 3 Burrows, 1521. This was an action upon the case upon articles of agreement, constituting a society for the mutual assurance of each other's ships, whereby they engaged, that whenever one of the members met with a loss, the others should contribute to make up the loss. The plaintiff showed that he had the requisite property in a ship, and became a member, and that the ship was lost. Plea, that the plaintiff had parted with his interest in the ship before the loss happened. Replication, that by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay £500 if a loss happened within three months; and

therefore he was interested in the voyage. Demurrer to replication, and joinder in demurrer. *Per curiam*: "As the plaintiff continued contributing to the losses of the others at the very time when this loss happened, it is but just and equitable, and within the words and meaning of the agreement, that they should contribute to his. He still had an interest in the safety of the ship; he had not parted with all his interest in it, but continued interested as to this loss."

Interest does not necessarily imply a right to a whole or part of a thing, nor necessarily or exclusively that which may be the subject of privation, but the having some relation to, or concern in,

for the price, and, while he retains them, has an insurable interest for this lien. If he sends them to the purchaser, his lien still

the insurance; but so far as the rights and liabilities of the insurer are concerned, it is not a question of privity, or want of privity, but one wholly of construction. What has the insurer engaged to do? All the ends of indemnity can be best gained if the assured is held bound to transfer the mortgage debt to the insurers. And it may be added, that from the beginning of insurance law, it seems to have been an unquestionable principle, that insurers who pay a total loss are subrogated to all the rights, interests, and claims of the insured, in or about the interest insured. On this principle the whole law of abandonment rests. And the foundation of this principle, as of the whole law of insurance, is indemnity.

We think that this view best accords with the decided cases, and with the settled principles of the law of insurance. Mr. Justice *Story*, in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 501, uses the following lan-

the subject of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing, and the interest derivable from it, may be very different; of the first

guage, directly to the point: "Where the mortgagee insures solely on his own account, it is but an insurance of his debt, and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby." See also the language of Chancellor *Walworth* in *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 397, and the recent cases of *Kernochan v. New York Bowery Fire Ins. Co.*, 5 Duer, 1, 17 N. Y. 428. Moreover the case of *King v. State Mutual Fire Ins. Co.* seems hardly consistent with a prior decision of the same court. It is provided by statute in Massachusetts that railroad corporations shall be responsible for losses by fire caused by their locomotives "to the person or corporation injured." In *Hart v. Western R. R. Corporation*, 13 Met. 99, a house which was insured was destroyed

the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such a thing may be considered as being comprehended." Per *Lawrence, J.*, *Lucena v. Craufurd*, 5 B. & P. 269, 302. See S. C. 3 B. & P. 75; *Craufurd v. Hunter*, 8 T. R. 13; *Stirling v. Vaughan*, 11 East, 619. And Mr. Justice *Story*, in *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132, 140, said: "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property or *jus in rem* or *jus ad rem*. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable."

continues till they reach the purchaser, because he may stop them as long as they are *in transitu*; and his insurable interest continues while the lien continues, and is not defeated by a stoppage *in transitu*.<sup>1</sup>

by a fire communicated to it indirectly by a locomotive engine of the defendants. The underwriters paid the owner the amount of the loss, and then brought this action in his name against the corporation. It was held that they were entitled to maintain it, and that the owner could not interfere with this right by releasing all claims against the corporation. *Shaw, C. J.*, said: Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law to those

who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is but one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction . . . . Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." Why should not the contract of the as-

<sup>1</sup> The authorities are strongly in favor of holding the right of the vendor to stop the goods, as an extension of the common-law lien for the price; or, as Lord *Kenyon* observed in *Hodgson v. Loy*, 7 T. R. 445, as "a kind of equitable lien adopted by the law for the purposes of substantial justice." The history and character of this right were much discussed in Lord *Abinger's* opinion in *Gibson v. Carruthers*, 8 M. & W. 321. See also *Wentworth v. Outhwaite*, 10 M. & W. 486. In the following cases in England, this right has been considered as an equitable lien, and not a rescission of the contract: *Gwynne, ex parte*, 12 Vesey, 379; *Martindale v. Smith*, 1 Q. B. 389. See also *Wilmshurst v. Bowker*, 5 Bing. N. C. 541, 7 Man. & G. 882; *Bloxam v. Sanders*, 4 B. & C. 941; *Edwards v. Brewer*, 2 M. & W. 375; *James v.*

*Griffin*, Ib. 632. In this country the right is universally considered as an extension of the common-law lien. *Hunn v. Bowne*, 2 Caines, 38, 42; *Rowley v. Bigelow*, 12 Pick. 307, 313; *Stanton v. Eager*, 16 Ib. 467, 475; *Newhall v. Vargas*, 13 Maine, 93, 15 Ib. 314; *Rogers v. Thomas*, 20 Conn. 53; *Jordan v. James*, 5 Ohio, 88. The vendee and his assignees may recover the goods on payment of the price, and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment of the price. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained. *Kyner v. Suwercroft*, 1 Campb. 109; *Newhall v. Vargas*, 13 Maine, 93, 15 Ib. 314.

A purchaser of property in good faith may insure his property, although his title is doubtful. The insurers cannot defend against his claim by showing that his title was defeasible because of some invalidity in the transaction.<sup>1</sup> Perhaps this distinction should be taken: the insurers cannot defend by showing that his title is *voidable*, but may defend by showing that it is wholly void, and might therefore defend by showing that he obtained the property by fraud.

A person may have an insurable interest in that which cannot insured, in this case, be construed to be as independent of the statute liability of the railroad company, as in the case of the mortgagee? It was not contended that the insurers came within the description of the statute as the "person or corporation injured," for the insurers were compelled to bring the action in the name of the assured. The right of the insurers to have the right of action against the railroad corporation transferred to them depended upon the construction to be given to the contract of insurance. It was construed as an engagement to run the precise risks the assured would otherwise have been compelled to run. The fact that the right of action given to the assured was a right of action for causing the very loss for which by contract the insurers were liable, could not, it would seem, affect the question, nor could the fact that the insurers must have known that there was a right of action against the railroad company. Could the fact that the mortgage is not specified, that, in fact, the mortgagee conceals his interests, enlarge his rights? See also *Quebec Fire Ins. Co. v. St. Louis*, 7 Moore, P. C. 286, 22 Eng. L. & Eq. 73; *Mason v. Sainsbury*, 2 Marsh. Ins. 794, 3 Doug. 61; *Clark v. Inhabitants of Blything*, 2 B. & C. 254, 3 Dowl. & R. 489.

To these considerations it may be added, that in life insurance it was for-

merly held that if a creditor insured the life of his debtor, and the debtor died, leaving ample means to pay the debt, the insurers were discharged. *Goodsell v. Boldero*, 9 East, 72. But this case is now overthrown, expressly on the ground that life insurance is *not* a contract of indemnity, and that it herein differs from marine and fire insurance, which *are* contracts of indemnity. *Law v. London Indisputable Life Policy Co.*, 1 Kay & J. 223; *Dalby v. India and London Life Ass. Co.*, 15 C. B. 365, 28 Eng. L. & Eq. 312. See *Loomis v. Eagle Life and Health Ins. Co.*, 6 Gray, 396.

<sup>1</sup> It was held in *Frierson v. Brenham*, 5 Louisiana Ann. 540, that where a steamboat was purchased at sheriff's sale, the purchaser had an insurable interest, though there was a contest as to the validity of his title under such purchase. And in *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vermont, 305, it appeared that the plaintiff had effected insurance on property which he held under a deed from a corporation, which deed was fatally defective in that it was not authorized by corporate vote. But, notwithstanding this, it was shown very clearly to be a deed which in equity would be binding on the corporation. Held, that his interest was insurable.

itself be insured. As in the wages of a seaman, or his share in expected profits or catchings.<sup>1</sup> If a seller retains any actual interest in the things owned, it may be insured.<sup>2</sup> And if the con-

<sup>1</sup> In *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, the plaintiff had shipped certain clothing, valued at \$1,000, on board a fishing vessel, to be sold to the crew as they might require from time to time, the amount of each purchase being a lien on the purchaser's wages. *Story, J.*, uses this language: "In regard to another suggestion, that the policy is void as against public policy, because it in effect amounts to an insurance of seaman's wages, a few words may suffice. Assuming, for the purposes of this argument, that an insurance by the seamen themselves, on their share of the proceeds of the adventure, would not be good, because they are in the nature of wages (a point upon which I desire to be understood as giving no opinion), it is a sufficient answer to the argument to say that the present is not the case of such an insurance. The plaintiff has insured his own interest in the voyage, and not theirs. They may, indeed, in a possible case, be benefited by this insurance; but the policy itself is not on wages, or on shares in lieu of wages; but simply on the property originally shipped, and upon the proceeds of the adventure, as far as the plaintiff could or might have a lien thereon for his advances to the seamen."

<sup>2</sup> *Bell v. The Firemen's Ins. Co. of New Orleans*, 3 Rob. La. 423. Action on a policy of insurance made on the 5th September, 1839, by the plaintiff, "on account of whom it may concern," &c., on the steamer *Bayou Sara*; risks insured against were of sea, river, and fire, the boat being employed on the Mississippi. There was no clause in the policy requiring the assent of the com-

pany to any assignment of it, nor forbidding the plaintiff to sell the boat, which was valued at \$20,000. On the 6th of September, 1839, the plaintiff, by a notarial act, sold and transferred all his right, title, and interest in the boat to one Northam for \$18,000, payable in instalments, receiving indorsed notes in payment, and being further secured by a special mortgage on the boat. Northam commenced running the boat, and shortly after sold one sixth of her to his clerk, Hooper. In February, 1840, the boat was libelled in the District Court of the United States, taken into possession by the marshal, who placed a keeper on board, and, while in his charge, she was destroyed by fire. The plaintiff's claim was denied by the insurance company, on the ground that he had no insurable interest. The court say as to this: "We have no doubt that, at the time the policy was executed, the plaintiff had an insurable interest in the boat. He was then the owner; and though he had agreed to sell to Northam, there had not been an execution of the contract. The sale was not complete. He, therefore, could insure on that day. . . . The principle of the law, that there must be an interest at the time of the loss is as well settled as that one must exist at the time of making the insurance; and the question now is, whether the plaintiff had such an interest at the time of the loss. The plaintiff does not pretend to have had the interest of an owner since the act of sale, but only that of a mortgagee or vendor, with a privilege on the boat. Can the character of the interest be changed, without the assent of both parties, between the time of effect-

tract of sale be conditional, it would seem, not only that he has an insurable interest in the thing until his sale be completed, but that this interest is not limited to the price he is to receive, but extends to the full value of the thing.<sup>1</sup>

A policy on time, or on a specified voyage, is made by the words "lost or not lost" to operate during the period defined, or the voyage specified, although the property had no existence when the policy was made,<sup>2</sup> provided it existed at the beginning of the period or voyage. These words are almost always used. It may, however, be doubted whether they are necessary to make the policy thus retrospective.<sup>3</sup> If goods are shipped, and their proceeds are to be paid to a creditor, he may insure them. But merely as creditor he has no insurable interest, unless some bargain, or the operation of law, gives it to him.<sup>4</sup>

ing the insurance and the loss? We think it cannot. Admitting that the plaintiff has a mortgage or privilege as vendor on the boat, to what extent would a policy attach? Clearly no further than to secure the payment of the debt. If Northam or any of the indorsers on the notes have paid or shall pay them, it is certain that the plaintiff can have no claim on the defendants; and if the latter were to pay the amount of the policy, they would be entitled to the amount of the notes."

<sup>1</sup> In the *Providence County Bank v. Benson*, 24 Pick. 204, W., being the owner of a quantity of wool, delivered it to the defendants, who were manufacturers of wool, on a written contract, which stated that he had sold and the defendants had bought the wool at a certain price, and that it was received by the defendants as the property of W., and was to be protected as such, but with the understanding that the defendants were to make payments from time to time until the full value of the wool should be paid, and that the wool was to be insured, while in the defendants' mill, against fire. The defendants effected insurance, but in their own

name, it being their intention to insure for W.'s benefit; and, before the happening of a loss, they told him they had effected a policy, according to their agreement with him. No part of the price having been paid, and the wool, in different stages of manufacture, having been destroyed by fire, and the sum due from the insurers having been attached in their hands on a trustee process at the suit of a creditor of the defendants, it was held that, whether W. could or could not maintain an action in his own name upon the policy, he had an equitable interest in it, which was equivalent to that of the assignee of a chose in action, and sufficient to entitle him to the avails as against an attaching creditor. See also *Stuart v. Columbian Ins. Co.*, 2 Cranch, C. C. 442.

<sup>2</sup> *Paddock v. The Franklin Ins. Co.*, 11 Pick. 227. See also *Hucks v. Thornton*, 1 Holt, N. P. 30.

<sup>3</sup> *Hammond v. Allen*, 2 Sumn. 396. See also 1 Roccus, Assec. n. 51; Pothier, *Traite des Assur.* n. 11, n. 46; Emerigon, c. 15, § 2, p. 154; 1 Marshall on Ins. Bk. I. c. 8, § 2, pp. 332, 333; *March v. Pigott*, 5 Burr. 2802.

<sup>4</sup> *Aldrich v. Equitable Safety Ins.*



SECTION X. — *Of the Defeasance of this Interest.*

AN insured may have a sufficient interest in the making of the policy, but it may be defeated afterwards, and this defeasance prevent or destroy his claim against the insurers. To have this effect, however, it must be something that operates as a complete divesting of his interest.<sup>1</sup> If the goods insured are attached for debt, or seized on execution, he has still an insurable interest until the sale is made. Nor would a common assignment to trustees for the benefit of creditors defeat his interest.<sup>2</sup>

If he has contracted to convey the subject of the insurance, his insurable interest continues until the conveyance is made.<sup>3</sup> Thus

Co., 1 Woodb. & M. 272. So, where they are assigned to him as collateral security. *Wells v. Philadelphia Ins. Co.*, 9 S. & R. 103.

<sup>1</sup> *Hibbert v. Carter*, 1 T. R. 745; *Locke v. North American Ins. Co.*, 13 Mass. 61. In this case, A, having borrowed money of B for the purchase of a cargo, assigned the same to B, taking the bill of lading and making the invoice in B's name, under an agreement that B was to first receive his debt from the proceeds of the cargo, if it should be sufficient and should arrive safely, and the surplus, if any, should belong to A; or, in case of a loss, B should receive the amount of the insurance which was effected in A's name; and if in either case B should not be fully paid, A was to be accountable for the balance, — the assignment and insurance being a pledge or security for the debt. A was holden to have an insurable interest in the cargo. *Lazarus v. Commercial Ins. Co.*, 5 Pick. 76. Nothing short of a conveyance of the property insured amounts to an alienation. *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 624.

<sup>2</sup> An ordinary assignment for the benefit of creditors constitutes the assignees agents, as it were, of the assign-

ors. *Adams on Equity*, 31. Such a transfer would not destroy the interest of the original insured, and hence such an assignment would not work an alienation. *Gourdon v. Ins. Co. of North America*, 3 Yeates, 327, 1 Binney, 430, note; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76. See also *Dadman Manuf. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. 429.

<sup>3</sup> *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330; *Gordon v. Massachusetts Fire & M. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76, 81; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. 718; *Higginson v. Dall*, 13 Mass. 96; *Rice v. Tower*, 1 Gray, 426; *Holbrook v. American Ins. Co.*, 1 Curtis, C. C. 193; *Rollins v. Columbian Ins. Co.*, 5 Foster, 200; *Folsom v. Belknap Co. Mutual Fire Ins. Co.*, 10 Foster, 231. In Vermont it seems to be doubted whether a mere mortgage would not be an alienation. *Tittlemore v. Vermont Mut. F. Ins. Co.*, 26 Vt. 546. In Indiana it is held to be an alienation. *McCulloch v. Indiana Mut. F. Ins. Co.*, 8 Blackf. 50; *Indiana Mut. F. Ins. Co. v. Coquillard*, 2 Curt. Ind. 645. But it seems to be well settled, both on principle and



it has been held that a policy of insurance will not be discharged by an executory contract for the sale of the object thereof, and by the receipt of a portion of the purchase-money, if the title to it at the time of the loss remains in the person insured; and his right to recover will not be limited to the balance of the purchase-money remaining due.<sup>1</sup> And it has also been held in the same court that if a mortgagor of a vessel sells his remaining interest therein, with a stipulation that he will pay off the mortgage, and fails to comply with this stipulation, and the bargain is accordingly given up and the title reconveyed to him, a policy of insurance issued to him before his agreement of sale will be valid to cover a loss of the vessel after the reconveyance of title to him.<sup>2</sup> And if the

authority, that it is not. See cases, *supra*; also *Bell v. Western Mut. & F. Ins. Co.*, 5 Rob. La. 423; *Hibbert v. Carter*, 1 T. R. 745; *Alston v. Campbell*, 4 Brown, P. C. 476; *Reed v. Cole*, 3 Burr. 1512; *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221. In *McLaren v. Hartford F. Ins. Co.*, 1 Seld. 151, it was held that the interest of the mortgagor is gone after a sale of the mortgaged premises by a master in chancery under a decree of foreclosure, and payment of part of the purchase-money, although the decree was not enrolled, and no deed executed by the master at the time of the sale. But in *Bragg v. New England Mut. F. Ins. Co.*, 5 Foster, 289, where the insurance was in the name of the mortgagor, but the defendants had agreed by a memorandum on the policy to pay the loss to the mortgagee, it was held that a subsequent foreclosure did not work an alienation. In *Morrison v. Tennessee Mut. F. Ins. Co.*, 18 Mo. 262, A effected insurance on certain property, and then sold it to B, who reconveyed it to a trustee, to secure to A the payment of the purchase-money. It was held that A still retained an insurable interest, and might recover on the policy to the extent of his actual loss. But if

A conveys part of the premises to B, and then takes back a lease of the same for five years at a nominal rent, this is an alienation. *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254. In *Abbott v. Hampden Mut. F. Ins. Co.*, 80 Me. 414, where the policy declared that an alienation in whole or in part should avoid the policy, a *feme covert* was tenant for life in one third of a lot of land, and tenant for a term of years in the rest. Her husband erected a house on the land, and caused it to be insured as his property. The husband and wife then conveyed to the reversioner the life-interest of the wife, on condition that he should pay her a fixed sum annually during her life. The husband at the same time conveyed all his interest in the estate for years, and took back a mortgage upon the whole lot to secure the payment of several sums in yearly instalments. The mortgagor entered into possession. The house was destroyed before any of the sums became payable. Held, that the conveyances amounted to an alienation.

<sup>1</sup> *Boston & Salem Ice Co. v. Royal Ins. Co.*; *Adams v. Park F. Ins. Co.*; *Same v. Suffolk F. Ins. Co.*, 12 Allen, 381.

<sup>2</sup> *Worthington v. Bearse*, 12 Allen, 382.

vessel be captured, that interest continues until condemnation.<sup>1</sup> It is a much more difficult question whether, if a vessel be liable to forfeiture for the breach of some statute law which has that effect, the insurable interest of the owner ceases as soon as the breach takes place, or continues until actual seizure, and perhaps until decree of forfeiture. This may depend in some measure upon the prior question, whether the property is vested at once in the government by the breach, or not until seizure or condemnation.<sup>2</sup> In our notes we show the adjudication on this

<sup>1</sup> *East India Co. v. Sands*, cited 10 Mod. 79; *Lucena v. Craufurd*, 5 Bos. & Pull. 269, 319, per Lord *Eldon*, C. J.; *The Arrogante Barcelones*, 7 Wheat. 496; *The Bello Corrunes*, 6 Id. 152.

<sup>2</sup> *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Amory v. McGregor*, 15 Johns. 24. But see *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184. In *United States v. 1960 Bags of Coffee*, 8 Cranch, 398, and *United States v. The Mars*, Ib. 417, it was held that the forfeiture took place the moment the act was done, and that a person who became a *bona fide* purchaser before seizure had no rights as against the government. See also *Gelston v. Hoyt*, 3 Wheat. 246. The words of the statute creating forfeiture, under which the cases of *United States v. 1960 Bags of Coffee*, and *United States v. The Mars*, were decided are that "whenever any articles, the importation of which is prohibited by this act, shall be imported into the United States, all such articles shall be forfeited." In *Clark v. Protection Ins. Co.*, 1 Story, 109, 134, Mr. Justice *Story* said: "It is not correct to say that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately divested. On the contrary, the established doctrine is, that, notwithstanding the forfeiture, the property remains in the owner until it is actually

seized by the government, and then by seizure the title of the government relates back to the time of the forfeiture. In the case of *United States v. 1960 Bags of Coffee*, and *Gelston v. Hoyt*, there had been a seizure and prosecution for the forfeiture by the government. The case of *The Mars* in this court, 1 Gallis. 192, 198, as to this point, has never to my knowledge been doubted or denied." See also dictum of *Wayne, J.*, in *Caldwell v. United States*, 8 How. 366, 380. On referring to the case of *United States v. The Mars*, 8 Cranch, 417, we find that no opinion was given, — the court stating that it depended on the coffee case, and therefore ordering the decree of the Circuit Court to be reversed. Mr. Justice *Johnson*, in delivering the opinion of the court in the coffee case, stated that the question rested altogether on the act of Congress; that it belonged to Congress "to decide on what event a divesture of right should take place, — whether on the commission of the offence, the seizure, or the condemnation"; and the court were of the opinion "that the commission of the offence marked the point of time on which the statutory transfer of right takes place." It thus appears that this case was decided on the sole ground that the forfeiture divested the rights of the owner, and vested the right of property imme-

subject, and it will be seen that it is difficult to determine the question positively upon authority. We, however, are strongly disposed to hold, on general principles, that the insurable interest continues until seizure, and we add until condemnation. If there be as yet no seizure, how can it be certain that there will be a seizure? The claim under the policy is not divested by the breach of the law *per se*, but by that only as it leads to forfeiture. But if it cannot be certain that seizure will be made, before it is made, so it cannot be legally certain that a breach of law was committed, or that it will be followed by forfeiture, until that be established by the judgment of a competent court. If we suppose that the breach itself, or even the seizure itself, destroys the insurable interest, what would be the effect of a final judgment in favor of the owner? Would the property again come under the insurance which has been suspended in the mean time? We should prefer to say that the insurance had never been either destroyed or suspended, and would not be until a final judgment of forfeiture. Where the government had the election, either to seize the property, or to proceed personally against the offender, we should be still more confident that the insurable interest was not divested until the seizure took place.<sup>1</sup>

diately in government. This case of *Clark v. Protection Ins. Co.* and the case of *Polleys v. Ocean Ins. Co.*, 14 Maine, 141, decide that the ship may be insured after the forfeiture and before the seizure. And the latter case is confirmed to some extent by the language of Mr. Justice *Story* in the Supreme Court of the United States, to which the case was taken. *Ocean Ins. Co. v. Polleys*, 13 Pet. 157. The decision of the court, however, proceeded on the ground that there was no jurisdiction. It is to be observed that the argument presented for the defence in this latter case was, that the vessel was sailing under circumstances which rendered her liable to forfeiture, and that the policy was therefore void. But if the defence had been taken that the interest of the insured ceased by the act of forfeiture, it

would be difficult to see how the case could be reconciled with the earlier decisions of the Supreme Court, above referred to.

<sup>1</sup> *United States v. Grundy*, 3 Cranch, 337. In this case it appeared that the United States had the option of a libel and condemnation of the vessel, the property of the defendant, or a proceeding in the nature of a personal action, but that before it elected the vessel was sold. Chief Justice *Marshall*, in delivering the opinion of the court, uses this language: "Has the doctrine of relation such an influence upon this case that an election subsequent to the sale shall carry back the title of the United States to the commission of the act of forfeiture, so as by this fiction of law to make them the real owners of the vessel at the time of sale, and conse-

quently of the money for which she was sold? Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine that the title to a thing which is to relate back to some former time must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title to the Anthony Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is

lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged."

## CHAPTER VI.

## AMOUNT OF INSURABLE INTEREST.

WE shall treat under this head only of open policies, thinking it better to discuss the amount of insurable interest in valued policies when we treat of those policies. Questions have arisen here which present some difficulty. We think, however, that the true answer to them may be found in the principle which underlies the whole law of insurance, and that is indemnity. And in case of loss the insurer is indemnified, provided he be restored to the same condition in which he would have been had he sustained no loss.<sup>1</sup>

There is, however, this qualification of the last remark; had he sustained no loss, or, in other words, had the goods arrived in safety at their intended destination, they might have found a very favorable market, and in that case the owner would have made a large profit. But the insured is not to be indemnified for the loss of these profits unless they were insured either under that name, or by a valuation of the goods that included them. So, on the

<sup>1</sup> In *Usher v. Noble*, 12 East, 639, Lord *Ellenborough* said: "It is admitted that the insured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated, is the question. In the case of a valued policy, the valuation in the policy is the agreed standard; in the case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value." *LeRoy v. United States Ins. Co.*, 7 Johns. 343. And in *Snell v. The Delaware Ins. Co.*, 1 Wash. C. C. 509, Mr. Justice *Washington* substantially says: "The foundation of all insurance, un-

less of the wager kind, is the real value of the thing insured. In a valued policy, the parties agree upon the value; in an open policy, the assured is bound to prove it. The prime or invoice cost may, in most cases, be *prima facie* a very proper criterion of value, but it is not conclusive. The actual value should be ascertained and determined, and this may vary from the invoice or prime cost; and, whatever the same may be, the assurers are bound to pay it in an open policy." See also *Carson v. The Marine Ins. Co.*, 2 Wash. C. C. 468; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436; *Gahn v. Broome*, 1 Johns. Cases, 120; *Anonymous*, 1 Johns. 312; *Suydam v. Marine Ins. Co.*, 2 Johns. 138; but see *Stevens v. Col. Ins. Co.*, 3 Caines, 43.

other hand, if the goods lose a part of their value between the time when the policy attached and the time of the loss against which the insurance is made, the insurers do not profit by this diminution of value. In both cases the value, or the amount of insurable interest, for which the insured is to be indemnified is the value when the policy attached,<sup>1</sup> — this continuing to be their value, as between insured and insurer, until the loss occurs.

So, also, as to the insurable interest in a ship in an open policy, if it be new, or if, being old, it has been purchased by the insured just before the insurance, its cost is its value in the policy.<sup>2</sup> But to this value of the goods or of the ship the premium is added to make the amount of insurable interest;<sup>3</sup> for in fact the goods considered as made safe by the policy have cost the insured just so much more as he paid for the premium.

But while the value of the property insured remains the same as between the assurers and assured, the interest of the assured in the property may vary to any extent. When the policy attaches he may own the whole or the half of the property, and when the loss occurs he may have a less interest or none at all, but he is paid only for the interest he has in the property at the time of the loss.<sup>4</sup>

<sup>1</sup> See n. 1, p. 242, and cases cited.

<sup>2</sup> *Weskett*, tit. Interest, n. 9. *Stevens on Average*, 190 (5th ed); *Shaw v. Felton*, 2 East, 109; *Snell v. Delaware Ins. Co.*, 4 Dallas, 430.

<sup>3</sup> *Usher v. Noble*, 12 East, 639. This was a case of general average, and, in making up the statement, the premium paid for insurance, as well as percentage for effecting the same, was included among necessary expenses. It being submitted to the court whether or not these should be allowed, Lord *Ellenborough* held: "In the case of a valued policy, the valuation is the agreed standard; in the case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is for all purposes of either total or average loss the standard of calculation resorted to for the purpose of ascertaining this value." This doctrine is fully adopted in the United States.

*Post v. Phoenix Ins. Co.*, 10 Johns. 75, where the reckoning in of the premium was allowed; *Clark v. United Fire & Marine Ins. Co.*, 7 Mass. 365; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436; *Carson v. Marine Ins. Co.*, 2 Wash. C. C. 468; *Snell v. Delaware Ins. Co.*, 4 Dallas, 430.

<sup>4</sup> *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515, in which it was held that none but the assured in a policy of insurance, or their legal representatives in case of death, can avail themselves of the contract, except in case of the transfer of the vessel and an assignment of the policy, with the assent of the underwriter thereto, either express or implied. *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Barr v. Gibson*, 5 M. & W. 390; *Howard v. Albany Ins. Co.*, 3 Denio, 301; *Murdock v. Chenango Co. Ins. Co.*, 2 Coms. 210.

The character of the interest may change without changing his insurable interest. Thus, if he owns half a vessel, and the other half is pledged to him as security by the owners, and he insures the whole vessel, and this other half is transferred to him outright before the loss, as he had an insurable interest in the whole when the policy attached, although his interest in one half differed in its character from his interest in the other half, he has such interest at the time of the loss.<sup>1</sup>

So, too, a charterer has an interest in the vessel which he hires; but if by the terms of the charter he pays nothing if the vessel be lost, he has no insurable interest; for the amount of that is only what he may lose if the vessel be lost.

As the insurable interest in goods is measured by their market value when and where the policy attaches to those goods, if the policy be on shipments successively made at different ports, the invoice value of each shipment when put on board gives the

<sup>1</sup> *Martin v. The Fishing Ins. Co.*, 20 Pick. 389. Opinion by *Putnam, J.*: "The report finds that the plaintiff and one Lamson bought the vessel together, and that the policy was made payable to the plaintiff, because Lamson had paid nothing for the vessel, and the plaintiff had indorsed Lamson's notes given for his moiety. And the plaintiff paid the whole of the premium. The plaintiff therefore had an interest when the policy was made, that the loss, if any should happen, should be paid to him, to enable him to get an indemnity against the liability he had assumed as indorser for Lamson for his half of the vessel. But there was no writing at that time between the plaintiff and Lamson in the nature of a mortgage or otherwise. But after a few months, and before the loss, Lamson gave a bill of sale to the plaintiff of his moiety. The plaintiff then became directly interested in the whole vessel, and continued to be and was interested in the whole at the time of the loss. If no assignment had been made by Lamson, there could be

no doubt but that the plaintiff might have recovered the whole, and would have been accountable to Lamson for the half; and he would, without doubt, have been thereby released from his liability as indorser. The intent of Lamson was to give the plaintiff an actual title, and not a mere contingent equitable interest. And can it be maintained that the assignment shall be considered as operating so as to destroy the right which he before had to receive the whole money in case of loss? We think not. The material allegation is, that the plaintiff had a legal interest at the time of the loss. We are satisfied that the plaintiff had such an interest, in the case at bar, and that none of the objections which have been raised can prevail "against the plaintiff's legal claim to recover." See also *Rhind v. Wilkinson*, 2 Taunt. 242; *Abitbol v. Bristow*, 6 Taunt. 464; *DeSymonds v. Shedden*, 2 B. & P. 153; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Col. Ins. Co. v. Lawrence*, 2 Pet. Sup. Court, 46; *Rider v. Ocean Ins. Co.*, 20 Pick. 259.



amount of the insurable interest in that shipment.<sup>1</sup> There may be an insurance on goods for a voyage which is to consist of suc-

<sup>1</sup> *Crowley v. Cohen*, 3 B. & Ad. 478. The same principle was laid down by Mr. Justice *Story* in a similar case. See *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, in which the original action was on a policy of insurance for \$10,000, lost or not lost, at and from Alexandria to St. Thomas and back, &c. It appeared that the vessel sailed on her voyage having on board flour of the invoice price of \$16,887. At St. Thomas a part of the cargo was sold; and, not being able to procure his price for the residue, the captain sailed with the ship for Cape Haytien, having on board doubloons, part of the proceeds of sales; and, before any cargo was sold, the vessel was wrecked off the harbor. The plaintiff abandoned; but the abandonment was never accepted. Mr. Justice *Story* delivered the opinion: "The first question arising in this case is upon the true construction of the policy itself as to the voyage insured. Is it an insurance upon the original cargo only, from the time of its loading till its final discharge? or is it an insurance upon every successive cargo which is taken on board in the course of the voyage out and home, so as to cover the risks of a return cargo, the proceeds of an outward cargo? Policies have never been construed in a strict and rigid manner. The instrument itself is somewhat loose in its form, and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is upon the face of the policy plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voy-

age to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent, to suppose that the parties deliberately contracted for risks on a homeward voyage on goods which, according to the known course of the trade, and the very nature of the commodities, were not, and could not be, intended to be brought back to the United States. We are of opinion that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods at and from a particular port, be-

cessive voyages from port to port. This cargo may therefore be diminished by leaving a part of the cargo at one of these ports. But the value of what is left may be as great as the whole amount insured, and the vessel with this amount on board may be lost. There may be two ways of adjusting such a loss. One would be to consider that the same proportion of the original cargo was insured which the sum insured was of the value of the whole cargo; and, as this cargo was diminished in value by the delivery of a part, the amount insured was proportionately diminished. The other way would be to consider that the policy continued to cover the whole amount of the insurance so long as so much value remained on board. It has been held by the Supreme Court of the United States that the latter is the true method of adjustment.<sup>1</sup>

In determining the value of the goods as the measure of the insurable interest, it must be remembered that the market price at the commencement of the risk is the measure of this amount, and this again is usually determined by the invoice price. And usually the invoice price if honest may be thought conclusive on this point. It certainly is so generally in practice, but the cases show that it is not in law. In one case in which the goods were invoiced at more than they had cost, but not at more than they were worth in the market, the court held that the actual cost

ginning the adventure from the loading thereof, has been held not to cover goods taken on board at an antecedent port. Those are all cases of insurance upon a single passage, unaffected by any known course or usage of trade to explain the intentions of the parties."

By the application of these principles to the facts of the case, the following result was obtained. More than \$3,000 worth of the flour was sold at St. Thomas, and the vessel was afterwards wrecked. At the time the vessel sailed, the value of the flour on board amounted to more than \$16,000; at the time of the loss it was worth over \$12,000. The question then was whether, at the time of the loss, the policy covered the

cargo then on board, to the whole amount underwritten, or only twelve sixteenths of it, on the ground that the insurance attached originally only to twelve sixteenths of the amount on board, and could attach to only the same proportion of what was on board at any subsequent time. It was, however, held that the policy covered \$10,000 during the whole voyage out and home, so long as the insured had that amount on board; and that the loss must be apportioned between the parties in the proportion which the sum insured bore to the amount of the value at the time of the loss.

<sup>1</sup> *Columbian Ins. Co. v. Catlett*, cited in preceding note.

measured the insurable interest.<sup>1</sup> It is not, however, clear that the actual cost always affords this measure; undoubtedly it would

<sup>1</sup> Stevens & Benecké on Average, (Phillips's ed.), 32; *Usher v. Noble*, 12 East, 639; *Gahn v. Broome*, 1 Johns. Cases, 120. In this country it has been made a matter of doubt whether, in the adjustment of a loss under an open policy, the value of goods should be taken to be their prime cost, their invoice price, or their actual market value at the commencement of the risk. The decisions are contradictory. In *Le Roy v. United Ins. Co.*, 7 Johns. 343, hides, the prime cost of which was ten cents per pound, were invoiced at twelve cents per pound, the value at the time of shipment and of effecting insurance. Held, that, in ascertaining the amount of loss, the hides should be reckoned at ten cents per pound. The court, however, disclaimed any intention of laying down a general rule. *Thompson, J.*, admitted that "the prime cost of the goods might not in many cases be a just rule of computation, as where they were not purchased with a view to immediate exportation, and remained on hand for a considerable length of time. But in matters of commerce the plainest and simplest rules are always the best. And I should incline to think that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is generally the market price of the article." In *Coffin v. The Newburyport Marine Ins. Co.*, 9 Mass. 436, goods invoiced at their real value at the time and place of shipment, which was greater than their prime cost, were reckoned at the invoice price. See *Emerigon*, c. 9, § 4, (Meredith's ed.) 217. It is ably contended by Mr. Justice *Washington*, in *Carson v. Marine Ins. Co.*, 2 Wash. C.

C. 468, that the true rule is to value the goods at their actual market value at the commencement of the risk. "Suppose," says he, "the property to be destroyed within an hour after the risk has commenced (and the time makes no difference in the principle), what does the owner lose? Precisely as much as it was worth, or would have commanded in the market at the time and place it was shipped, including expenses, and no more. If the property cost him less than it was worth when shipped, he loses as well the first cost as the increased value, for which he is entitled to claim an indemnity from the insurer. If it cost him more, he loses the difference between the first cost and the diminished value when the property was shipped; but for this difference he can have no claim for indemnity under the contract, because the loss did not result from any of the perils against which an indemnity was stipulated, but from an unprofitable speculation, anterior to, and unconnected with, the contract. . . . It is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price, which was contended for on behalf of the plaintiffs, is liable to all the objections that exist against the prime cost, and to an additional one, which, in the opinion of the court, cannot be surmounted. It furnishes no rule of indemnity in any one case where it exceeds or is less than the market value of the article; if the former, the insured is more than indemnified, by receiving more than it was worth; if the latter, which, it is presumed will seldom if

be greatly regarded, but the market value may have varied since the time of the purchase of the goods and the beginning of the risk, and the market value at this time measures the insurable interest.<sup>1</sup>

ever happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of property at risk is, that it substantially destroys all distinction between valued and open policies, and this, too, in the face of one of the best-established rules of evidence. It makes a private document, created by one party to the contract, evidence against the other, as to a fact which it is essential for the other to prove in an ordinary way. In case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because both parties have agreed that the property at risk was worth so much. But to bind the insurer by the arbitrary value fixed in the invoice, is to subject him to *ex parte* evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not accompany the cargo, it would follow that all policies would in fact be valued; but with this difference only, that what has hitherto been understood as valued policies means nothing more than such as are valued by one of the parties only." See also *Snell v. Delaware Ins. Co.*, 4 Dall. 430. The difficulties in the way of adopting the market value in the insured value in an open policy are in bringing forward proof of such value. The invoice price should, without doubt, be taken to be *prima facie* proof of the real insurable value. It cannot, however, be regarded as conclusive proof. Nor should the insured be prevented from invoicing

their goods at their real, that is, their market value, where they have risen in price since a purchase.

<sup>1</sup> *Snell v. Delaware Ins. Co.*, 4 Dallas, 430, S. C. 1 Wash. C. C. 509. In this case it appeared that on the vessel insured policies had been written by two companies, in the first for \$5,000, and in the second, the defendant, for \$2,500; it was shown that the vessel cost, having been bought at auction, about \$5,000, although it was not denied that she was actually worth more than that sum. On the trial of the case the question was, whether the plaintiff could go into evidence to prove the actual value of the vessel, or were bound by the price that was paid for her. On the first ground, the sum insured upon both policies would be about the value and, on the second ground, the amount received from the first insurers would be about sufficient to cover the loss. The court "were clearly of opinion, that the plaintiffs were entitled to prove and to recover the actual value of the vessel, at the time she was insured." They said a contrary rule would operate as injuriously to the underwriters as to the merchant. For, if the merchant could not insure a ship, or goods, bought at a depreciated price, under a forced sale, at their real value, neither would the underwriter, in case of loss, be entitled to show, upon an open policy, the actual value of the property, independent of a fortuitous enhancement of the price in a foreign market. See also *Carson v. The Marine Ins. Co.*, 2 Wash. C. C. 468. This was an agreed case, in which the only question submitted to the court was, whether, in

But the practice, as we have said, is almost universal, of taking the invoice price as the measure of indemnity; and it may be convenient to adopt it as a practical rule, applying it for the sake of uniformity even to the few cases in which this price is somewhat more or less than the market value.

It would seem as if the actual cost is, or at least was, the European rule, for Emerigon asserts it to be so.<sup>1</sup> In one English case it was held, where the invoice was in foreign currency, that the rate of exchange, to determine the amount to which the insurers were liable, was the rate at the time of payment.<sup>2</sup> This decision is

case of a total loss of goods insured in an open policy, the invoice price, agreeing with the first cost, shall be taken as fixing the value; or, the current market price of similar goods at the time and place of shipping them,—the latter being about twenty-five per cent lower than the former. Mr. Justice *Washington* was, “on the whole, of decided opinion that judgment in this case must be rendered according to the market price of the property insured, at the time and place of exportation.”

<sup>1</sup> Emerigon, des Assurances, Tom. I. p. 261.

<sup>2</sup> In *Thelluson v. Bewick*, 1 Esp. 77, where goods were invoiced in the currency of France. Lord *Kenyon* held, that the rate of exchange at the time of the adjustment of the loss should govern; but this decision cannot be sustained upon principle, and is generally questioned by the text-writers. The question now seems to be, whether the current rate of exchange, at the time the risk commenced, or the legal par value, is to be taken. Mr. Arnould, Vol. I. page 330, citing an earlier edition of Mr. Phillips's work on Insurance, considers it the better rule to take the par value. But the rule of the text is sustained by Mr. Phillips in his last edition; 2 Phillips, Ins. § 1231. This precise question does not appear

to have arisen in any late insurance case, but a similar question has been discussed in cases where a party is sued in one country for money which was to be paid in another country. Mr. Justice *Washington*, in *Smith v. Shaw*, 2 Wash. C. C. 167, held, that the current rate of exchange was to be taken into consideration. And Mr. Justice *Story* expressed a strong opinion to the same effect, in *Grant v. Healey*, 3 Sumner, 523. But in *Martin v. Franklin*, 4 Johns. 124; *Scofield v. Day*, 20 Johns. 102; and *Adams v. Cudis*, 8 Pick. 260, it was held that the debt was to be paid at the par of exchange. The reason for the rule, as given in *Martin v. Franklin*, is, that “the courts are not to inquire into the disposition of the debt after it reaches the party.” In *Lodge v. Spooner*, 8 Gray, 166, a certain sum of money was to be paid in China on the performance of an agreement entered into between the parties. The plaintiff performed his part of the contract, and claimed to recover, in addition to the original sum and interest, the rate of exchange between this country and China, at the time when the debt should have been paid. But the court held that he was not entitled to the exchange, and evidence that there was no tribunal in China in which one foreigner could recover of another, and that these funds

not supported by any other. We believe the practice to be that, to determine the value of the goods, the rate of exchange, when

were to be invested in China, was held to be inadmissible.

We cannot but think that the American decisions, which hold that money to be paid abroad is to be paid here at the legal par, rest upon a great mistake of the courts, or rather upon their entire disregard of a great mistake made by our statutory provisions on this subject. In the statute of 1799, c. 22, sec. 61, 1 U. S. Stats. at Large, 673, it was provided that "each pound sterling of Great Britain shall be estimated at four dollars and forty-four cents." But this rate was about nine per cent too low. That is, the gold and silver in, or represented by, one pound sterling in England is equal to about four dollars and eighty-eight cents of our money. Or, in other words, the statute puts our dollar about nine per cent too high in comparison with the pound sterling. The consequence was at once a rise in our exchange on England of about nine per cent, to make the actual par, and so it has continued. The proof of this is, that when exchange is worth a little more than about nine per cent, it is worth more than the actual par, and gold goes from this country to England; and when the exchange is a little lower than this actual par of about nine per cent, gold comes from England here. Thus, if a man owes a merchant in London one thousand pounds sterling, he will send him a bill for the amount, if he can buy it for what the law says it is worth and about nine per cent more (paying here in gold), for this is the best thing he can do. But if he cannot buy that bill for less than ten or twelve per cent, he will send the gold instead. But if A here sues B for one thousand pounds, to be

paid in England, and recovers, our courts have said that B must pay him \$ 4,400. But when B gets this in gold, and ships this to England, he finds that he wants nearly four hundred dollars more, to give him there a thousand pounds sterling, because the law has rated the pounds sterling too low, and the dollar too high, by that difference. We infer, from remarks often made in books which relate to our trade, etc., that the constant rate of about nine per cent advance on exchange on England is understood even now, by some merchants and writers, as arising from the state of our commerce. That this is not so is proved, not only by the flow and reflux of gold turning on a point about nine per cent advance, but by a later statute of the United States. It was found that when a duty (say twenty per cent) was paid on the value of goods imported from England, and this value was taken by estimating the pound sterling at legal par, the revenue lost twenty per cent, or one fifth of about one eleventh part of all the value of English goods subject to ad valorem duties. Accordingly, in the Statute of 1842, c. 66, sec. 1, 5 U. S. Stats. at Large 496, it was provided that, "in all payments by or to the treasury, whether made here or in foreign countries, where it becomes necessary to compute the value of the pound sterling, it shall be deemed equal to four dollars and eighty-four cents, and the same rule shall be applied to appraising merchandise imported, where the value is by the invoice in pounds sterling." But while Congress has thus acknowledged and rectified its mistake for revenue purposes, the legal par value remains the



the risk on them attaches is taken; we consider it indeed to be law that the rate of exchange existing at that time should be so taken.<sup>1</sup>

If the charterer or shipper advances the freight on his goods, and this is not to be repaid to him though the goods be lost, it might seem that the freight thus advanced was a part of the cost of the goods, and therefore of their insurable value. But it is nevertheless freight, and it has been held that it cannot be covered by an insurance of the goods. It may have been paid for the use of the ship, or for any other reason, but is still no part of the value of the goods. It might be insurable as freight, but not otherwise. This has been held in one English case<sup>2</sup> in which the question was quite fully considered.

To the price paid for the goods, when taken as the measure of the insurable interest, are added, both in England and in this country, the charges and expenses necessary to put them on board, and commissions actually paid to agents and factors.<sup>3</sup>

Where imported goods pay a heavy duty, this of course enters into their price, because the seller must be as much reimbursed for

same as before between individuals, and they rectify it by the rate of exchange. And if courts see fit to adopt a fixed rate instead of the changing rate of commerce, it is obvious that great injustice is done, unless the revenue rate is adopted, instead of the general legal rate.

<sup>1</sup> See *Burgess v. Alliance Ins. Co.* 10 Allen, 221.

<sup>2</sup> *Mansfield v. Maitland*, 4 B. & Ald. 582, where the memorandum for charter stated that one half of the freight was to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months' date, and then after containing stipulations for unloading, discharging, demurrage, &c., added: "The captain to be supplied with cash for the ship's use," and in pursuance of the last stipulation the master drew a bill on the freighters which was accepted and paid. Held, that this was not to be considered as a payment of freight in advance, but

as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill. In *Wilson v. The Royal Exch. Ass. Co.*, 2 Camp. 626, Lord *Ellenborough* held, that a policy of insurance on money lent to the captain, payable out of the freight, is illegal, and the premium cannot be recovered back from the underwriters.

<sup>3</sup> *Usher v. Noble*, 12 East, 646; *Anonymous*, 1 Johns. 312; *Fontaine v. The Columbian Ins. Co.*, 9 Johns. 29; *Stevens v. The Columbian Ins. Co.*, 3 Caines, 43; *LeRoy v. United Ins. Co.*, 7 Johns. 343; *Gahn v. Broome*, 1 Johns. Ca. 120; *Suydam v. Mar. Ins. Co.*, 2 Johns. 138; *Tuité v. Royal Exch. Co.*, Parke, 224, 225 (8th ed.); *Marshall on Ins.* 232; *Stevens on Average* (8th ed.), 178 *et seq.*; *Benecké, Pr. of Indem.* 12-14.



this as for whatever else he pays for the goods. But if the goods are re-exported, a drawback may be allowed, and this is a return of so much of the duty paid for the goods. If then the *price* of the goods includes the whole duty, the actual *cost* of the goods includes only so much of the duty as is paid by the purchaser, and not repaid to him. So, if a bounty be paid on exported goods, the purchaser pays the whole price, and, if he exports the goods, he receives the bounty, which so far diminishes his cost. And the question has arisen whether this drawback or bounty is to be deducted from the price, and only the residue considered the insurable interest. This question has come before the court of New York,<sup>1</sup> and it has been held that the drawback should not be deducted, mainly on the ground that it is paid to the importer or purchaser only on condition that the goods be not relanded; and as it would be forfeited if they were relanded even by barratry, the interest in the drawback is contingent and uncertain. The reason is not a very strong one, but in practice we believe the drawback is not deducted.

Where the insured owns ship and cargo, and has an insurance on freight, his interest therein will be what he would have earned

<sup>1</sup> In *Gahn v. Broome*, 1 Johns. Ca. 120, *Lansing, C. J.*, says: "The drawback is intended as a benefit to the merchant on the exportation of certain goods, and not for the advantage of the assurer; and, although it may enter into the estimate of the value of the goods with a view to exportation, it is no part of their actual price in the market here. The invoice price has been adopted, as affording not only an equitable but a certain rule, not influenced by the fluctuations of value, which subsequent circumstances may produce. If the drawback were also certain, and in every event payable to the shipper, the exception in this case would seem to be reasonable; but that is not the fact. To entitle the goods to drawback they cannot be relanded within the United States, and the shipper is obliged to give security that they shall not be relanded. The drawback is, therefore,

contingent; and, in the case of relanding by barratry, the assured would not only lose the amount of the drawback, but be exposed to inconvenience and additional loss on account of the security. Against the risk of barratry he would surely be unprotected; and yet that is a risk within the express terms of the policy, and for which the assurer has received his premium. To permit the drawback to reduce the value to be recovered would, therefore, confer a benefit on the insurer, and impose on the insured a burden and a risk without an indemnity,—a burden by giving the security, and a risk in the case of barratry, as has been mentioned." See also *Minturn v. The Columbian Ins. Co.*, 10 Johns. 75, in which it was held, that, in calculating the amount of loss on the cargo upon a policy of insurance, the goods are to be estimated at prime cost and charges, without deducting the drawback.

had there been no loss, and this will be determined by the usual payment for such goods carried in similar vessels between the same ports.<sup>1</sup>

Where the ship-owner carries the goods of other parties, his interest will be determined by the contract of affreightment. For this purpose the amount payable to him, or the gross freight, was taken as this measure.<sup>2</sup> It is quite obvious that this rule may give the insured more than indemnity, and perhaps it may be open to the objection, urged in England, that it opens a door for fraud. But in England it seems to be the "invariable usage," and is sanctioned by judicial decision; and the weight of authority, as well as the prevailing custom, is the same in this country.<sup>3</sup> To this amount of freight, whether gross or net, the premium of insurance and commissions are added to make up the insurable interest.<sup>4</sup>

A vessel may be chartered upon terms which divide the freight between different passages, half, for instance, being payable on her arrival out, and the other half on her arrival home.<sup>5</sup> Here the

<sup>1</sup> Under an open policy on freight from India to London, the gross freight was £ 8,068, to earn which it was necessary to expend £ 699; and, a total loss having taken place, the question arose whether the amount of interest under the policy should be estimated at the gross or net freight. Witnesses conversant with the subject of insurance at Lloyd's, where the policy was made, stated, that, according to the invariable usage there, the gross freight constituted the amount of the interest. Mr. Justice *Park* and Mr. Justice *Burrough* considered, accordingly, that the amount of interest, and therefore of the loss, was the gross freight, and so was the decision of the court, there being only three judges present. Mr. Chief Justice *Dallas* doubted the propriety of the rule, since it allowed the assured to receive more than an indemnity, and opened the door for frauds. *Palmer v. Blackburn*, 1 Bing. 61.

<sup>2</sup> See *Stevens v. Columbian Ins. Co.*, 3 Caines, 43, opinion by *Thompson, J.*,

where it is said: "Although indemnity is the leading object of insurance, it is not always the criterion by which to ascertain the amount of the loss. No general rule giving a specific portion of the freight could with justice be adopted. It would operate unequally, by reason of the great diversity in the distance and expense of voyages; and to adopt the net amount of freight as a rule would lead to much litigation and uncertainty respecting deductions to be made. But to take the gross amount of freight as the rule of damages, would be equal, simple, and easily ascertained." *McGregor v. Ins. Co. of Penn.*, 1 Wash. C. C. 39.

<sup>3</sup> See cases cited in preceding note.

<sup>4</sup> *Usher v. Noble*, 12 East, 239, fully stated in note 3, p. 243, which see, and cases there cited.

<sup>5</sup> In *Meech v. Philadelphia Fire and Inland Ins. Co.*, 3 Wharton, 473, insurance was made in the sum of \$ 2,000 upon the freight of a vessel, at and from Philadelphia to Tampico; at and from

whole freight is at risk as soon as the vessel sails, and the insured therefore has then an insurable interest in the whole freight. But if the vessel arrives at the port, or at successive ports, earning by her arrival and safe delivery of the goods there the freight to such port or ports, so that it is no longer at risk, it ceases to constitute a part of the insurable interest in freight.<sup>1</sup>

We believe open policies on profits are seldom made unless they provide a method by which, in case of loss, the profits shall be measured by a reference to the goods. There could be no other way of determining the amount of this insurable interest, except by proof of how much profit such goods, bought at such a price, and carried at that time and that place, would have yielded. Through all this the principle of indemnity runs. It is always taken to be the purpose of the policy to put the insured, so far as relates to the interest insured, and the risks against which he is insured, in the same condition as if there had been no loss. And an open policy in favor of a person whose interest in the property is that of an equity or a lien must be measured by the same principle.<sup>2</sup>

thence to Laguna or Campeachy; and at and from either to Philadelphia or New York. By the terms of the charter-party, the charterer bound himself to pay, as the freight or hire of the vessel, during the term of the contract, the sum of \$2,000, "to become due, owing, and payable in manner and form following, viz.: On the arrival of said vessel and delivery of the cargo, there shall be due, owing, and payable the full and just sum of \$1,000, payable in Mexican dollars; and on the return of the said vessel to the port of Philadelphia, there shall be due, owing, and payable the further sum of \$1,000; the said two sums making the \$2,000 before named." It was held that this was to be considered an entire contract in reference to the insurance; and, the vessel having been lost on her outward voyage, that the assured were entitled to recover the whole amount insured.

<sup>1</sup> *Hugh v. The Union Ins. Co. of Baltimore*, 8 Wheat. 294. In this case two policies were written on freight valued at \$12,000 in each, on a voyage from Teneriffe to Havana, thence to New York, with liberty to stop at Matanzas. Freight for Havana valued at \$7,000, which the vessel carried, was received by the consignee at Matanzas, and freight paid. The ship then went to Havana, from thence sailing for New York with a cargo for which the freight was to be \$420, and was lost on the passage. The question was, whether only the freight from Teneriffe was insured. It was held, in New York, that the policy covered the freight from Havana, and judgment was given for the \$420.

<sup>2</sup> In *Irving v. Richardson*, 2 B. & Ad. 193, the defendant had effected insurance in his own name with the corporation represented by the plaintiff, in

amount £ 2,000, having previously insured the same ship to the amount of £ 1,700 with another company. It appeared that his interest was that of a mortgagee for £ 900. The question was, whether the defendant had received more — loss having taken place and policies having been paid — than the actual value of the ship, insurable and insured by him. Held, that it was prop-

erly submitted to the jury whether, in effecting the policies, the defendant meant to insure his own interest only, or that of the mortgagor also, — a mortgagor, at least since the Register Act of 6 G. 4, c. 110, not being an owner to any greater extent than the value mortgaged, and the mortgagor continuing an owner. S. C. 1 M. & R. 153.

## CHAPTER VII.

## VALUED POLICIES.

As the purpose of indemnity for loss belongs to all insurance, we have seen that the law and practice of insurance provide carefully for the accurate measurement of the loss, and the first step towards this is to determine the value of the interest or property which is the subject of insurance. To do this with precision is often difficult and sometimes impossible. To avoid this difficulty, the parties frequently agree as to this value, and declare it in the policy. We believe this to be common in this country, and still more common in England. Arnould says, "every common printed form of policy in this country" contains the valuation clause.<sup>1</sup>

In a valued policy this clause is filled up with the sum which the parties agree upon as the amount of the insurable interest. In an open policy the clause is left in blank. In the English policies the valuation clause is in the body of the instrument. In the American policies it is generally in the form of a note in the margin. The phrase "valued at" is almost always used for the purpose of expressing a valuation. These words are not, however, necessary, and any other words which express the same idea with equal distinctness would be as effectual. But as this phrase is so universally adopted, so simple and expressive, we should say the presumption was against the probability that parties would resort to other words to express this purpose. But words distinctly declaring the "worth" of property insured have been held to constitute a valued policy in a case of fire insurance.<sup>2</sup> But a

<sup>1</sup> 1 Arnould on Insurance, (Perkins's ed.) 309. The clause reads: "The said ship, &c., goods and merchandise, &c., for as much as it concerns the assured, between the assured and the assurers in this policy, are and shall be valued at —."

<sup>2</sup> In *Harris v. the Eagle Fire Ins.*

Co., 5 Johns. 368, the policy was on merchandise and utensils in a tobacco manufactory, among which were three hundred and eighty kegs of manufactured tobacco, stated on the back of the policy to be "worth \$9,600," one hundred and fifty-seven kegs of which were destroyed by fire; it was held that the as-

provision that "no proof of property shall be required in case of loss". was held not to be a valuation.<sup>1</sup>

sured were entitled to recover for the loss according to the valuation of the whole number of kegs.

<sup>1</sup> *Hemmenway v. Eaton*, 13 Mass. 108. This was an action on the case upon a policy of insurance on the Swedish schooner *Sara*, her cargo and freight, from her port of lading in the West Indies to a port of discharge in the United States. The policy was in the common form, except that it contained an agreement that, in case of loss, no proof of property was to be required, and no return of premium to be made for want of interest. In case of capture, the assured agreed to claim as Swedish property. In the margin was a memorandum: "Swedish register and papers complete. Swedish captain and crew, except one man." The defendant subscribed \$200, and the subscriptions of prior underwriters amounted to \$2,000. The vessel sailed from St. Bartholomew's with a full cargo, and on her passage was captured by a British vessel of war, and carried to Halifax, on suspicion of being American property. While the vessel was under detention at Halifax, the plaintiff abandoned. After abandonment, the vessel was sold by order of the admiralty, and the proceeds of the vessel and of a portion of the cargo were paid over to the plaintiff's agent, who had followed the vessel to Halifax, deducting certain large expenses. It was contended, in defence, that it was for the plaintiff to prove, by the production of the original documents, and by evidence of the Swedish laws, that the *Sara* and her cargo were properly documented as Swedish property. The jury were instructed that the release of the vessel and her cargo

was evidence from which, together with other evidence in the cause, they might infer that they were properly documented as Swedish, and that, under the circumstances, it was not incumbent on the plaintiff to produce the documents themselves, or to show by evidence what were the requisites of the Swedish law. Verdict for plaintiff for \$206. On exception, it was contended for the defendants, that, on the face of the policy, it was a mere wager, and, as such, void; or, if not a wager policy, it must be considered, not as a valued, but as an open one, and the plaintiff should therefore prove his interest, as in other cases of open policies. For the plaintiff it was insisted, that, having proved some interest in the subject, and then shown it not to be a wager policy, the plaintiff was not to be held to prove the amount of his interest. The particular stipulation was introduced to avoid the necessity of any such investigation; and it amounts to an agreement, on the part of the underwriter, that the assured was interested to the amount insured, for which he was willing to pay a premium. *Parker, C. J.*, held: "The object and intent of the agreement not to require proof of property is sufficiently evident. It was to prevent, on the one hand, the underwriter from denying his liability for want of legal evidence of property in the plaintiff; and, on the other hand, to prevent the plaintiff from withholding the premium, on the ground that he had no legal interest. To give it any other construction would be to violate the good faith which ought to subsist between parties who, by the necessities arising from war, have been driven to pretences of this kind, in order

The valuation in a valued policy is held to be almost conclusive. The very purpose for which it is made is that the parties may be relieved from all necessity of inquiring into this value. No valuation, however, covers a wager policy; or, in other words, there must be some interest to be valued. If, however, there be any actual interest, and the valuation is not fraudulent, we should say that courts to-day, both in England and this country, would strongly incline to support the valuation.<sup>1</sup>

All commercial property has an uncertain value. The whole business of commerce, whether large or small, domestic or foreign, is founded upon the expectation of selling at a higher value than that at which the thing was bought; and it is not easy to fix a limit to this possible rise in value. It is certain that the insurer may cover his profits by a valuation of his goods, and if he is very sanguine and disposed to guard against any possible loss, and is willing to pay a proportionate premium, there seems to be no reason why the insurers should not be held to their bargain. The authorities are very numerous on this question, and cannot be reconciled. On the one hand an overvaluation of one third was said to be "surely" such an over-estimate as "shocks the sense," and

to be able to carry on commerce of any kind. It was never intended that the plaintiff should recover more than he had at risk. . . . Policies held to be valued have become so by virtue of certain words which may be considered technical, and they are well understood by all who concern themselves in commerce. It would be dangerous to give to any other form of words that meaning, where any doubts may exist as to the intention to give them effect. We are clear that the plaintiff can recover only according to his interest insured by the policy, after deducting what had been previously insured, and that there must be an abatement of the premium in proportion."

<sup>1</sup> In *Alsop v. Commercial Ins. Co.*, 1 Sumner, 451, 473, which was a case of insurance upon profits, Mr. Justice Story said: "I do not know that any

overvaluation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached." See also *Robinson v. Manufacturers' Ins. Co.*, 1 Met. 143, where it was held, that, as the valuation was not so great as to raise a suspicion of fraud, the underwriters were not entitled to have the policy opened, but were liable for a total loss; and in *Gardner v. Col. Ins. Co.*, 2 Cranch, C. C. 550, it was held that "overvaluation is not *per se* an evidence of fraud, but was a circumstance proper for the jury in considering the question of fraud; and that, if they should find that the vessel was fraudulently overvalued, the plaintiff could not recover even the value of the property, for the fraud invalidated the contract altogether." *Irving v. Manning*, 1 H. L. C. 287, 304, 1 C. B. 391, 419, per *Patteson, J.*



it avoided the policy.<sup>1</sup> In another early case, where a ship was valued at more than three times her actual worth, the court held that the policy was valid, and the insured recovered his whole insurance, which was nearly three times the proved value of the vessel, on the ground that she might have fairly cost her owners the whole amount of her valuation.<sup>2</sup> This is rather a strange

<sup>1</sup> *Catron v. Tennessee Ins. Co.*, 6 Humph. 176. One Napier, in December, 1838, effected an insurance in the defendant corporation on two pieces of property, valuing them respectively in his application at \$12,000 and \$10,000, the insurance being \$5,000 on each estate. The property was destroyed, and the insured applied for the amount of the policies, but, under the circumstances, the payment was refused. Catron, the plaintiff, claiming to be a creditor of Napier, filed his bill of complaint in the Court of Chancery, setting forth that the insurance company was indebted to Napier, who had removed himself out of the State, and praying that the amount be attached by the court and appropriated to the payment of his debt. One of the grounds on which the defendants resisted the payment of the amounts of the policies was, that Napier, at the time of effecting the insurance, was an owner of only one half the property, which fact he did not disclose to the company. This fact was established, and the court say: "This being so, Napier was the owner of one undivided half of the premises insured. This fact was not communicated to the insurance company, and he effected, as we have seen, an insurance upon the whole estate, in his own name and for his own benefit. We think this vitiates the policy. If the company had been informed that Napier had the ownership of only one half, they surely would not have permitted him to effect an insurance on more than that half; they might

not have insured at all. Besides this, we have no doubt, from the proof, that the property was grossly overvalued, having been estimated at some four thousand dollars more than it was really worth. This of itself would avoid the policy; for though it is true that slight over-estimates, such as a man might, in the valuation of his property, honestly make, would not vitiate a policy of insurance, yet it is equally true that an over-estimate, such as shocks the sense, and shows that it could not have been made but by design, will. This an overvaluation of one third surely is."

<sup>2</sup> *Hodgson v. Marine Ins. Co.*, 5 Cranch, 100, S. C. 6 Cranch, 206. Insurance having been effected on the ship *Hope*, from her last place of lading to a port of discharge in the Chesapeake, and the vessel having been lost, this action was brought in the Circuit Court of the District of Columbia. Among other pleas was one to the effect that an overvaluation of the ship had been made when the insurance was effected. On this point the court, through Mr. Justice *Cushing*, said: "Without deciding whether a material misrepresentation not fraudulent can be pleaded in avoidance of a sealed instrument, the court thinks there is no fact disclosed which could vacate an insurance, were it only a simple contract. In no part of the plea is the misrepresentation alleged to be material. It is only to be inferred that it had some influence (but to what degree it does not appear) in prevailing on the defendants to agree to

reason, for it implies that a ship which twenty years before had cost twenty thousand dollars, and had depreciated by age and wear and tear, until she was not worth one tenth as much, might still be valued at her original cost and insured for her full value.

Mr. Justice Story said: "I do not know that any overvaluation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached."<sup>1</sup> This, however, was in a case of insurance upon profits, — a subject in reference to which it would be especially difficult to set limits to an overvaluation. We exhibit in our notes the leading authorities upon this subject.<sup>2</sup>

so high a valuation. It will hardly, however, be insisted that every overvaluation, however inconsiderable, or however innocently produced, will annul a contract of this nature. It would seem more reasonable to let mistakes of this kind, if they are to have any operation at all, regulate the extent of the recovery, and not deprive the party of his whole indemnity; for, if an extravagant valuation be made, an underwriter cannot reasonably ask to be relieved beyond the excess complained of. The allegation that the vessel was worth when insured only \$3,000 is also very unimportant, it being nowhere stated that the plaintiff represented her to be worth more, but only proposed that her value in the policy should be agreed at \$10,000. Now, although she might not, in fact, have been worth that sum, it is impossible for the court to say that this difference was produced entirely by the mistake which was made in her age and tonnage. This would be to say that a difference of a year or two in the age, and of fifty or sixty tons in the burden, of a vessel, must, in all cases, have the same effect on her value, — a conclusion which, on investigation, would be found to be very incorrect. Now, if it appeared on the trial that her actual worth was no more than \$3,000, would it necessarily avoid the contract, or re-

strict the damages to that sum? for she may, notwithstanding, have fairly cost her owners the whole amount of her valuation, who, in that case, would have honestly represented her as worth \$10,000."

<sup>1</sup> *Alsop v. Commercial Ins. Co.*, 1 Sumner, 451, *supra*.

<sup>2</sup> In *Hodgson v. Marine Ins. Co. of Alexandria*, 5 Cranch, C. C. 100, 6 Cranch, 206, the ship was valued at \$10,000 and insured for \$8,000. The court held that it would not necessarily avoid the contract, nor restrict damages to that sum, if it were proved that the actual value of the vessel was no more than \$3,000, because she might have fairly cost her owners the whole amount of her valuation. In *Miner v. Tagert*, 3 Binney, 204, the action was against an agent for neglecting to effect an insurance on a vessel, the value of which was stated to be \$4,000, amount of insurance desired, \$3,000. It was in evidence that the vessel was worth \$1,600 or \$1,800. It was held that the agent was responsible, and damages were assessed as in a valued policy, amounting to \$2,978. See also *Brooke v. Louisiana State Ins. Co.*, 16 Mart. La. 640; *Akin v. Mississippi Mar. & Fire Ins. Co.*, 16 Ib. 661. In *Kane v. Commercial Ins. Co.*, 8 Johns. 229, *Thompson, J.*, said: "It is well settled that the valua-

One thing must always be remembered ; it is, that fraud vitiates and avoids this contract as it does every other. No one doubts that a fraudulent valuation would be set aside ; but Mr. Phillips thinks that the effect of the fraud would be limited to the valuation, leaving the policy valid, but opening it to evidence, and limiting the recovery of the insurer to the amount of insurable interest which he can prove to have been on board. We see no sufficient reason for this distinction. The very case cited in support of it seems to us to oppose it. There is no ground for an exception in this case to a rule of the law of contracts which is quite universal. It is very simply, and as we think very accurately, expressed by Sir James Mansfield, C. J., thus : “ If the bankrupt (the insured) intended, from the beginning, to cheat the underwriters, the assignees can recover nothing, the fraud entirely

tion in a policy is conclusive upon the underwriters, when there is no suggestion of fraud or imposition.” In *Protection Ins. Co. v. Hall*, 15 B. Mon. 411, the court said : “ A small overvaluation, or such as might be reasonably accounted for on the ground of difference of opinion, might not have vitiated the policy. But if the overvaluation be serious and knowingly made, or made upon work not done, or a subject not in existence, and that fact not disclosed, whatever may have been the particular motive, and it could scarcely have been anything else than to get a greater sum insured, it must, under the general principles of the law of insurance, be deemed a sufficient cause for avoiding the policy.”

In *Whitney v. the American Insurance Co.*, 3 Cow. 210, it is said : “ The contract in a valued policy is to pay the assured the whole valuation, if the subject of the policy be lost ; and the valuation in the policy is conclusive as to the amount of recovery if the subject be lost by the perils insured against, unless there be fraud or imposition in fixing the value.”

*Shaw v. Fulton*, 2 East, 109. *Mansfield*, C. J., said, in *Feise v. Aguilar*, 3 Taunt. 506 : “ It has been held, again and again, that it is unnecessary to prove the amount of interest in a valued policy. Therefore we must take it that the value insured is the value of the plaintiff’s interest.” *McKim v. Phoenix Penn. Ins. Co.*, 2 Wash. C. C. 89 ; 2 Phillips on Ins. § 1183 ; *Clark v. Ocean Ins. Co.*, 16 Pick. 289 ; *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341 ; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 56 ; *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132. But see *Hamilton v. Mendes*, 2 Burr. 1198, 1213, in which Lord Mansfield says : “ An overvaluation is contrary to the general policy of the marine law ; contrary to the spirit of the act of 19 G. 2 ; a temptation to fraud, and a source of great abuse. Therefore no man ought to be allowed to avail himself of having overvalued. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss ; and the insured ought never to gain more.”

vitiates the contract.”<sup>1</sup> Mr. Phillips goes on to remark that where an overvaluation is fraudulently made with the intention on the part of the assured to destroy the property, for the purpose of recovering of the insurers the amount at which it is valued, such a fraudulent purpose will make the whole contract void. Of this there can be no doubt; but our opinion is, that any material and certain fraud in the valuation would have this same effect. We think our notes will show that the authorities are quite decisive on this point.<sup>2</sup> An overvaluation is not a proof of fraud, and perhaps no overvaluation would be of itself, and necessarily, a proof of fraud. But if it be gross and excessive, it would have a tendency to prove fraud.

<sup>1</sup> *Haigh v. De La Cour*, 3 Campb. 319. See next note.

<sup>2</sup> See *Catron v. Tennessee Ins. Co.*, 6 Humph. 176, *supra*. Mr. Phillips states the rule thus: “If the goods have been fraudulently overvalued, the valuation is not binding. Where an overvaluation is fraudulently made, with the intention on the part of the assured of destroying the property, for the purpose of recovering of the insurers the amount at which it is valued, such a fraudulent purpose will make the whole contract void.” 2 Phillips, Ins. § 1182. The case of *Haigh v. De La Cour*, 3 Campb. 319, is cited in support of this proposition. But we think that the rule is well settled, that a fraudulent overvaluation for any purpose will avoid the policy *in toto*, and not merely open the valuation. *Gardner v. Col. Ins. Co.*, 2 Cranch, C. C. 550; *Ocean Ins. Co. v. Fields*, 2 Story, C. C., 59, 77; *Hersey v. Merri-mack Co., Mut. Fire Ins. Co.*, 7 Foster 149, 155; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411, 429; *Catron v. Tenn. Ins. Co.*, 6 Humph. 176, 185. There was, in this last case, evidence of intent to destroy the vessel, but the court considered that a fraudulent overvaluation of itself would be sufficient to annul the policy. The case of *Haigh v. De*

*La Cour*, 3 Campb. 319, does not seem to us to warrant the distinction taken by Mr. Phillips. The insurance was on goods valued at £5,000. This valuation was obtained in false representations, by fictitious invoices, and by interpolated bills of lading, the value of the goods being only £1,400. The ship was afterwards run away with, and carried to the West Indies, where the cargo was disposed of by a person whom the owners of the goods had put on board as supercargo. The action was brought by the assignees of the insured, they having become bankrupt, and it was contended that they had the right to recover the actual value of the goods on board; but Sir *John Mansfield*, C. J., said: “If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract.” It does not appear that the owners had anything to do with the running away of the ship, or that the act of the supercargo, in selling the cargo, was not, under the circumstances, for the best interest of all concerned. The case, therefore, seems a good authority in support of the proposition, that a fraudulent overvaluation for any purpose avoids the policy.

It is not uncommon for the insured to value in the same policy a part of the property insured, and not the remainder. Thus, if the insurance be on ship and freight, the freight may be valued and the ship not valued, or the ship and not the freight.<sup>1</sup> So, if the insurance be on goods and profits, the profits may be valued and the goods not. As valuation is always intended to guard against the necessity of proof of value, there is a reason for the practice of valuing some things and not others, in the fact that it is much more difficult to prove the value of some insurable interests than of others.

The insured may be insured on the same interest by one insurer in an open policy, and by another insurer in a valued policy, and each policy will stand so far independent of the other, that his claim under each will be governed by the provisions of that policy, with no reference to the provisions of the other policy.<sup>2</sup>

<sup>1</sup> *Riley v. Hartford Ins. Co.*, 2 Conn. 268. In this case, where a policy of insurance on vessel and freight of goods "laden and to be laden," contained a clause valuing the vessel at \$ 8,000, but leaving a blank for the value of the freight, and the policy was underwritten for "\$ 8,000 on vessel," and "\$ 2,000 on freight," it was held that this was an open policy as to the freight.

<sup>2</sup> It is difficult, if not impossible, to deduce from the adjudicated cases clear and well-defined rules to determine the effect of valuations, where there are prior insurances, or amounts have been paid upon other policies. In England a loss is paid proportionally by the different sets of underwriters, and not according to priority as in this country; and it would seem that in an action upon one policy a valuation in another policy is disregarded. In *Bousfield v. Barnes*, 4 Campb. 228, a vessel valued at £ 8,000 was insured for £ 6,000. By a subsequent policy the same vessel was insured for £ 600, being valued at £ 6,000. Upon the happening of a total loss, the sum insured

by the first policy, £ 6,000, was paid to the assured. In an action upon the second policy it was contended that the plaintiff was estopped to say to the underwriters upon this policy that the ship was worth more than £ 6,000, and that, by receiving that sum from the previous underwriters, the plaintiff was fully indemnified. Lord *Ellenborough* said: "I think it is not enough for the underwriters on a particular policy to show that the assured had received from another quarter the amount of the valuation in that policy, unless this amounts, in point of fact, to a complete indemnity. In the present case the ship is proved to have been worth above £ 8,000. The plaintiff has received only £ 6,000 from the London assurance. He has therefore an interest of £ 2,000 to which he may apply the policy on which the action is brought." The doctrine of this case was somewhat modified by the subsequent case of *Irving v. Richardson*, 1 Moody & R. 153, 2 B. & Ad. 193. In this case a vessel was valued at the same sum, namely, £ 3,000, in two different policies. Losses

If, however, a party is insured on the same interest in different policies, in all of which the interest is valued, it is still more

were paid by both insurance companies to an amount greater than the valuation, and an action was brought by one company to recover its proportion of the excess. The case went off on a ground other than that of the effect of the valuation, but it was distinguished from *Bousfield v. Barnes*, by Lord *Tenterden*, C. J., in that "there the sum mentioned as the value was different in the two insurances; here it was the same." He further said: "I am of opinion that where a person effects two insurances, declaring the value in each, he is bound by that sum, and cannot recover beyond that extent." The case of *Kenney v. Clarkson*, 1 Johns. 385, goes still further than *Bousfield v. Barnes*, in setting aside a valuation. A vessel worth \$7,000 was insured, valued at \$2,000. There were prior insurances to the amount of \$5,000, and upon the happening of a loss there was recovery upon one policy to the amount of \$3,000. Held, that the assured might recover. In *Watson v. Ins. Co. of North America*, 3 Wash. C. C. 1, a vessel worth \$15,000 was insured for \$12,000, and valued at the same sum. It was held that a prior bottomry bond, which was substantially an insurance for the amount of the bond, should, in estimating the amount covered by the policy, be deducted from the real value, and not from the agreed value. There are, however, cases in favor of upholding the valuation where there have been prior insurances. Thus in *Murray v. Ins. Co. of North America*, 2 Wash. C. C. 186, a vessel was insured in one policy for \$4,000, and valued at that sum, and in a subsequent policy for \$4,000, and valued at \$6,000. In an action on the

second policy, held that the defendants were liable for so much of the *agreed* value of the vessel as was not covered by the prior insurance, that is, to the extent of \$2,000. In *Kane v. Commercial Ins. Co.*, 8 Johns. 229, insurance was made to the amount of \$15,000 on "goat-skins valued at fifty cents each," and the policy contained the usual clause as to prior insurance. A prior insurance had been made by an open policy on the cargo on board the same ship, for the same plaintiffs, to the amount of \$22,000. The prime cost of the skins was ten cents each. Estimating the skins at fifty cents each, and the rest of the cargo at the invoice prices, the amount was sufficient for both policies; but the cargo, exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy, it was held that the whole of the goat-skins were to be valued at fifty cents each; and after deducting from this amount the difference between the invoice price of the cargo and charges, exclusive of the goat-skins, and the \$22,000, or amount of prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at fifty cents each, would furnish interest sufficient for both policies. *Thompson, J.*, said: "The policy is not that as many of the goat-skins as remain uncovered by the former policy, at the invoice price, shall be covered by this policy at the valuation. This is not the sense and meaning of the contract. It is that the goat-skins laden on board shall be valued at fifty cents; and in determining how far the plaintiff's inter-



difficult to state the effect of these policies, the one on the other. We are the less helped by English authorities on this subject, which we have cited in our notes, from a difference between their practice and ours, where there are successive insurances. There, the different sets of insurers are considered as having made one policy, and each one pays his proportional share of the loss. In this country, by force of the "American clause," the first insurer pays his whole insurance, and the second policy is held to attach to only so much of the property or interest insured as is left uninsured by the first policy, and so on through all of them. It would seem that, in England, if property is valued at a certain amount and insured thereon for a less amount, and is insured on a subsequent policy at a valuation which is the same as the amount insured in the first, the insurers of the second policy cannot say to him, We have agreed that the value is so much, and the whole of that amount you have received under the first policy, and therefore suffered no loss. The ruling seems to be in such a case that the valuation in the second policy is open to evidence, and if it can be shown that the actual value exceeded that valuation, so that some part of her actual value was unpaid by the first policy, the insured can recover under the second policy.<sup>1</sup>

We have spoken of this ruling, however, as somewhat uncertain, because it is made so by subsequent cases.<sup>2</sup> It would also seem, from the remarks of Lord Tenterden,<sup>3</sup> that, if the value is the same in two policies, he cannot receive on the two more than the whole

est was covered by it, all the goat-skins on board are to be reckoned according to this valuation." See *Minturn v. Columbian Ins. Co.*, 10 Johns. 75; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55. A different rule was laid down in *McKim v. Phoenix Ins. Co.*, 2 Wash. C. C. 89. It was held in that case that a valuation of coffee at twenty-two cents per pound was to be applied only to that part of the coffee which was uncovered by a prior policy. It would seem, however, from the opinion of Mr. Justice Washington, that the second policy, in addition to the ordinary clause, making the insurers answerable for as much as the prior insurance was

deficient towards covering the property, contained a clause making it null and void so far as the property had been previously insured.

Where it is clear that the valuation applies to the whole thing insured, and not to the surplus after deducting the prior insurances, as was clearly intended in *Kenny v. Clarkson*, it is difficult to see upon what principles it can be set entirely aside.

<sup>1</sup> *Bousfield v. Barnes*, 4 Campb. 228, *supra*.

<sup>2</sup> *Irving v. Richardson*, 1 Moody & R. 152, S. C. 2 B. & Ad. 193, *supra*.

<sup>3</sup> In *Bousfield v. Barnes*, 4 Campb. 228, *supra*.



valuation, whatever may be the actual value. Thus, if in two policies on a ship, she is valued in each at £ 3,000, and is insured at £ 2,000, the insured can recover only three thousand pounds, that is, £ 1,500 for each, although her actual value may be £ 4,000.

The American cases proceed on the American rule as to successive insurances; but it cannot be said that they leave it certain how far the valuation of a prior policy affects a later policy. In one case, a prior bottomry bond (which, being substantially a prior insurance for the amount of the bond, must be deducted from the insurable interest to determine how much was covered by a subsequent policy), the court directed that it be deducted from the actual value, and not from the agreed value thus opening the valuation to proof.<sup>1</sup> This, however, has not been uniformly held, as where a vessel was insured in one policy for four thousand dollars, and valued at that sum, and in a subsequent policy was insured for four thousand dollars, but was valued at six thousand, the second insurers were held, under their own valuation, to pay for the difference between that agreed value, and the sum paid under the prior policy, namely, two thousand dollars; although the prior insurers had paid the whole of what in that policy was agreed to be her value.<sup>2</sup> A similar conflict attends the question which arises when the prior policy is an open one, and the second policy a valued one. This question is, whether the valuation in the second policy applies to all the goods or only to so much of them as were left uninsured by the first policy,—the interest in that first policy being measured, as is usual in open policies, by the invoice price. It is easy to see that if the valuation in the second policy applies to all the goods, a case might easily occur in which, after the whole interest was exhausted and completely covered by an open policy, a new insurable interest was created by the valuation for the second policy. If, for example, fifty thousand dollars were insured on cotton in an open policy, and the same sum insured on the same cotton valued at thirty cents a pound, and a total loss occurred, if the insured sue the first insurers, proving that the cotton cost him fifteen cents a pound, and that at that rate what he had on board was worth fifty thousand dollars, he would re-

<sup>1</sup> *Watson v. Ins. Co. of North America*, 3 Wash. C. C. 1, *supra*, n. 2, p. 263.

<sup>2</sup> *Murray v. Ins. Co. of North America*, 2 Wash. C. C. 186, *supra*, n. 2, p. 263.

cover this whole sum from the first insurers. If then, turning to the second insurers, he proved that the cotton on board when valued at thirty cents a pound, or twice its cost, was worth twice the former sum, or one hundred thousand dollars, and of this he had been paid only half by the first insurers, he could therefore claim of the second insurers the other half.<sup>1</sup> This view has been held in this

<sup>1</sup> *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55. This was a case of insurance on a voyage from St. Petersburg to Philadelphia. The vessel was captured, and the assured abandoned. The only difficulty arose on the principle upon which the loss should be adjusted. Besides the policy in suit, eight others were effected in Philadelphia. In seven of them no valuation was attached to the ruble; in the eighth it was valued at forty cents; and on the one in question, which was the ninth in order, at forty-six cents. In settling the first seven, the ruble was estimated at thirty-three and one third cents, which was its received value in Philadelphia. On the eighth it was settled at the stipulated value of forty cents. The value of goods laden on board the ship was proved to be 95,565 rubles. The sums paid on the eight first policies corresponded to the adjusted value of 94,084 rubles, leaving a balance of only 1,481, equal, at forty-six cents, to about \$ 682, unpaid. But if the whole amount of the cargo be brought into dollars, at forty-six cents to the ruble, and the sum in dollars actually paid on the other policies be deducted, there would still remain more unpaid than would exhaust the whole sum underwritten on the ninth policy. On the part of the plaintiff, it was contended that the compensation paid to the plaintiff on the other policies is absolute and complete as to the corresponding amount in rubles, leaving only 1,481 unpaid. On the other hand, the plaintiff contends

that the compensation was only relative, and cannot affect his rights as between himself and the defendant. "And of this opinion is the majority of the court." In *Minturn v. Columbian Ins. Co.*, 10 Johns. 75, goods were insured from New York to Tonningen, and the insurance was expressed to be on "coffee valued at twenty-five cents per pound," and there was the usual clause as to prior insurance. A prior open policy had been effected in London on the cargo of the same ship generally, consisting of coffee, pepper, sugar, and wood. The vessel was wrecked on the coast of Holland and totally lost, with her cargo, a small part only being saved. In an action on the second policy, it was held that that part of the cargo, being pepper, &c., not insured by the second policy, estimated at the first cost without deducting the drawback, was to be deducted from the sum insured on the first policy, including the premium; and the residue was to be applied to the coffee, at its prime cost and charges, including the drawback; and the coffee remaining uncovered by the first policy, estimated at twenty-five cents per pound, and adding the difference between the first cost and the valuation on the quantity covered by the first policy, together with the premium of insurance on the second policy, constituted the amount of interest to be covered by the second policy. *Kane v. Commercial Ins. Co.*, 8 Johns. 229; *Minturn v. Columbian Ins. Co.*, 10 Johns. 75.

country, but so also has the opposite view, namely, that if the first policy is settled, as open policies are, by proof of actual value, and it is found that the insurance by that policy leaves a certain proportion of the goods uncovered, then the whole valuation attaches to this part of the goods.<sup>1</sup>

We do not know that there is any practice under this question sufficiently established to have the force of mercantile usage. So far as we have been able to learn how such cases are adjusted, we should say that the prevalent view was that the insured, in making his second policy, intended to cover by his valuation an interest in the whole property which should be measured by a valuation of the whole, and where the valuation is applied to a thing not separable into portions, as a ship, we can see no sufficient reason for confining this valuation in the second policy merely to the surplus of proved value left uncovered by the prior policy.

The insured may value a certain interest of which he owns only a part, and then the question arises, whether the intention of the parties is to value only the insurable interest of the insured, or the whole property. Let the insurance be on goods valued at ten thousand dollars, and the insured is shown to own only one half; a total loss occurs. Is he to be paid ten thousand dollars or five thousand dollars? This is manifestly a question of construction, and it must be decided mainly from the intention of the parties, as that may be gathered from the instrument. The cases cited in our notes will show that there is no positive rule on this subject.<sup>2</sup> The principles and purposes of insurance, which always rest finally on indemnity, would perhaps lead to a presumption that the

<sup>1</sup> *McKim v. Phoenix Ins. Co.*, 2 Wash. C. C. 89; see *supra*, n. 2, p. 263.

<sup>2</sup> *Feise v. Aguilar*, 3 Taunt. 506. As this is a question of construction, if it appear from the face of the instrument that the valuation applies to the whole property, it will be so held. *Dumas v. Jones*, 4 Mass. 647. In this case the plaintiff effected insurance in his own name only; a loss taking place, he claimed the full amount of the insurance; but it appearing that he was the owner of a moiety only of the interest insured, it was held that he could re-

cover only a moiety of the insurance. *Murray v. Columbian Ins. Co.*, 11 Johns. 302. And see *Mayo v. Maine Fire & Marine Ins. Co.*, 12 Mass. 259. In this case insurance was effected for \$9,000 on a ship valued in the policy at \$18,000, at a premium of forty-five per cent, the assured making no representations of his proportion of the vessel, but being in fact owner of one third only. A total loss happening, he claimed the whole sum, on the ground that he intended to insure the premium; and it was held that he could recover.

valuation was intended to be of the whole subject-matter. But, on the other hand, the principles and purposes of valuation would lead to the presumption, we think quite strongly, that it was intended to apply to the insurable interests of the insured, and to be itself the amount he should recover in case of total loss.

Where it is clear that a valuation was intended to apply to a certain quantity of goods, all of which it was intended should be at risk and covered by the policy, and only a part of these goods are on board and at risk, the valuation is applied to this part *pro rata*.<sup>1</sup>

Nor is it the intention alone which always governs. In one case at least, where a valuation was intended to cover certain property, and the property was on board, but the word "cargo" was used in the policy, and the court held that the mercantile meaning of this word did not include property of this kind, and consequently that the policy did not attach to it, the valuation was opened.<sup>2</sup>

<sup>1</sup> "The valuation in the case of goods looks to all the goods intended to be loaded; and in case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured. . . . If, for instance, the insurance be generally upon goods, and the goods intended to be protected be five hundred hogsheads of sugar, and a valuation be made accordingly; but the ship by accident takes on board one hundred only, and sails, and afterwards is lost by one of the perils insured against, with those one hundred on board, can it be contended that the insured shall recover to the full amount of the valuation, that is, for the whole five hundred, when he has lost only one hundred?" Per Lord *Ellenborough*, C. J., *Forbes v. Aspinall*, 13 East, 323. See *Rickman v. Carstairs*, 5 B. & Ad. 651; *Haven v. Gray*, 12 Mass. 71, 76, per *Parker*, C. J.; *Clark v. Ocean Ins. Co.*, 16 Pick. 289, 295; *Mutual Marine Ins. Co. v. Munro*, 7 Gray, 246, 249; *Whitney v. American Ins. Co.*, 3 Cow.

210; *Brooke v. Louisiana State Ins. Co.*, 16 Martin, La. 640, 681.

<sup>2</sup> *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429. Action on a valued policy on brig *Henry* and cargo on freight, total loss having happened. No question was made as to the vessel; but it was objected that there was no cargo or freight at the risk of the underwriters; and that if there was anything on board which might be considered as cargo, and if there was any freight at risk, the policy must be opened to ascertain the extent of the interest of the assured in those subjects respectively. The property consisted partly of mules, and corn and hay put on board for their subsistence on the voyage, and ten doubloons. It was contended that the hay, &c., were protected by the policy under the name of cargo. The court held, however, that "they are more analogous to outfits than cargo. This food for cattle was not laden on board as merchandise; and the circumstance that some of it might remain on board to be sold at the end of the voy-

Another question of construction occurs when the outward cargo is valued, and it is intended to provide from its proceeds a return cargo, and the insured insists that the valuation covers the return cargo as well as the outward cargo. If the insurance be on the cargo "out and home" at a valuation, it would seem that the valuation should apply to the homeward cargo, on the ground that there could have been no intention to bring back the outward cargo, except in its proceeds.<sup>1</sup> But where the valuation was on certain goods enumerated, then it might be inferred that only these enumerated articles were intended to be valued, and consequently that there was no valuation of the return cargo.<sup>2</sup>

In the case in which Mr. Justice Washington so held, given in our notes, the decision may have been influenced by the circumstance that the valuation was contained in a memorandum separate from the policy, but referred to. As a general rule, we should say, in reference to this question, that a valuation of the whole subject-matter of the insurance would be presumed to be a valuation of the in-

age does not make it cargo any more than the remnants of fishing-lines, harpoons, &c., in the whale fishery would make the outfit to become cargo, within the common meaning and understanding of merchants and underwriters." It was further held that mules could not be insured as cargo; and in support of this were cited *Lawrence v. Aberdeen*, 5 B. & A. 107; *Coit v. Smith*, 3 Johns. Ca. 16. "These views of the case reduce the plaintiff's interest in the cargo covered in the policy to ten doubloons, and the freight of them from St. Jago to Charleston."

<sup>1</sup> *Haven v. Gray*, 12 Mass. 71. In this case an insurance was effected for \$11,000, "upon one hundred bales of Louisiana cotton, valued at ninety-four dollars each, and twenty-five tons of logwood, valued at eighty dollars per ton," out and home. Held, that the valuation would apply to a return cargo, provided and advanced by the consignees of the outward cargo, in consid-

eration of the assignment and on the account and credit of the assured.

<sup>2</sup> *McKim v. Phoenix Ins. Co.*, 2 Wash. C. C. 89. In this case there was an insurance of \$12,000 upon the cargo of a vessel out and home, and the policy contained a memorandum at the bottom, by which it was declared that the insurance was "on flour, dry goods, wine, and provisions, &c., &c., valued at \$12,000," Mr. Justice *Washington* held, on the ground that the valuation should be restricted to the articles enumerated, that the outward cargo alone was valued. This is in all cases a question of construction, of the intent and meaning of the parties as expressed upon the face of the policy. Where the insurance is effected upon the cargo of a vessel out and home, and the valuation is applied generally to such cargo, there is no difficulty in applying such valuation to a return cargo. *Whitney v. American Ins. Co.*, 3 Cow. 210, affirmed on error, 5 Cow. 712.

sured's whole interest, including his premium, unless the contrary was expressed in the policy, or should be inferred from a rational construction of it, aided as far as the law of evidence permits by extrinsic proof. Our notes will show the cases in which the premium was held to be included, and those in which it was not.<sup>1</sup>

Mr. Benecké is of opinion that when the foreign coin in which the invoice value is or is to be expressed is valued at so much in the coin of the place where the insurance is made, the premium is included unless it be expressly stipulated otherwise, for the reason that fixing the value of the coin is in fact a valuation of the goods.<sup>2</sup> We should not, however, hold that to be a valuation of the cargo, which may be merely a determination of the rate of exchange.<sup>3</sup>

While a valuation is final and conclusive in case of a total loss,

<sup>1</sup> *Brooks v. Oriental Ins. Co.*, 2 Pick. 259. This was a case of a valued policy upon a ship, by which the insurer was not to be liable for a partial loss unless it should amount to five per cent. It was held, that the percentage should be recovered upon the valuation after deducting the premium. In *Mayo v. Maine Fire & Mar. Ins. Co.*, 12 Mass. 259, an insurance was effected for \$9,000 on a ship, at a premium of forty-five per cent. The vessel was valued at \$18,000, which was its real value. The assured owned only one third of the vessel. Held, that the premium was not included in the valuation, but should be added to the interest of the assured in determining the amount of his insurable interest under the policy. The assured recovered the whole amount insured. There seems to be no good reason for disputing the authority of this case. Where the subject is insured in gross, at a round sum, and the assured owns the entire subject or interest valued, there is, no doubt, a very strong presumption that the premium is included in the valuation. Such, in the

absence of opposing indications, is the rule of law. Where, however, the assured owns only a part of the subject insured, the whole of which is valued, the presumption would seem to be the other way. In *Mayo v. Maine Fire & Mar. Ins. Co.*, if the premium must be supposed to be included in the valuation of \$18,000, it should, in order that justice may be done to the assured, be, not the premium upon the \$9,000 insured, but the premium upon the entire insurable interest. Circumstances, clearly admissible in evidence, showed that this was not the case.

<sup>2</sup> Mr. Benecké says, p. 159 (London ed.), *Benecké & Stevens on Average* (Phillips's ed.), 54: "Where the foreign coin, in which the invoice value is expressed, is valued at so much in the coin of the place where the insurance is effected, the premium, in the absence of express stipulation, would be held to be included, "because fixing the value of the coin is, in fact, a valuation of the goods."

<sup>3</sup> See *Ogden v. Columbian Ins. Co.*, 10 Johns. 273, *supra*.



its effect upon a partial loss is much less certain. In the early cases it was distinctly declared that the valuation was disregarded in a case of partial loss. In the words of Lord Mansfield, an average loss opens the policy. Or in the words of Lord Lee, quoted by Lord Mansfield, valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only.<sup>1</sup> The decisions continued in the same direction, and in 1811 the Supreme Court of Massachusetts said: "The rule is, however, fixed and established by usages for a long time recognized, and by several judicial decisions, and is upon these considerations reasonable and satisfactory, that stipulations of value, when they are questioned and disputable, are to be disregarded in cases of partial and average losses."<sup>2</sup>

We think these words state, or at least imply, the true principle which should determine this question. Where both parties agree that goods are of a certain value, and there is neither fraud nor mistake in the calculation, there can be no reason whatever why it should not be as binding in case of a partial, as in case of a total loss. We believe this to be both the present law and the practice. If the whole cargo be worth ten thousand dollars (and the agreement of both parties as to its value is the best possible evidence of its value), and one half of the cargo is lost, what reason can there

<sup>1</sup> In *Shaw v. Felton*, 2 East, 109, 113, the counsel in arguing cited the case of *Le Cras v. Hughes*, E. T., 22 G. 3, in which Lord Mansfield is reported to have said: "The constant usage since the stat. 19 G. 2, in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it; but an average loss opens the policy. I will give you the origin of this custom. It was in a case of *Erasmus v. Banks*, Mich., 21 G. 2, where Lord Chief Justice Lee said: 'Valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only.' On the 13th December, 1747, the same point came before the court in *Smith v. Flexney*, and was so determined."

<sup>2</sup> Per Sewall, J., in *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365. This was an action upon a policy, whereby the defendants assured the plaintiff \$2,000 on the ship *Olive Branch* and cargo, on a voyage from K. to C. and thence to port of discharge in the United States, — \$1,500 on vessel, and \$500 on cargo, the vessel being valued at \$6,000. The defence was deviation, by which the policy was vacated. The court held, that, under the circumstances, there was no deviation. The defendants were defaulted, and the question as to the amount of damages to which the plaintiff was entitled was submitted to the court upon an agreed statement, and Judge Sewall's opinion was in relation to this point.



be for receiving evidence as to the amount lost, which would not apply just as well if the whole cargo was lost? It may be seldom practicable, in case of partial loss, to determine the precise proportion of the loss; but we do not see that this affords any reason whatever for opening the valuation. The two inquiries which must be made, namely, what was the value of the whole, and what proportion of that whole is lost, are perfectly independent. If the policy be an open one, both inquiries must be made, and both answered by evidence. The second question, what proportion of the cargo is lost, must be raised as much in a valued policy as in an open policy. But it does not seem reasonable to say, that, because we must inquire into the proportion lost, since we are not aided here by any agreement of the parties, we will also inquire, by evidence, into the value of the whole; and, that we may so inquire, we will set aside a positive agreement of the parties on this very point. Mr. Arnould<sup>1</sup> appears to think that this necessity of ascertaining by evidence, under a valued policy, what proportion of the valued property is lost, is all that is meant by the earlier English cases, which hold that the valuation is opened in cases of partial loss. But the receiving of this evidence has nothing to do with the valuation of the whole, and we should suppose in those cases the court meant what they certainly said, — that the valuation is itself set aside in adjusting a partial loss; and we should say, as was said in the Massachusetts case above referred to, that stipulations of value, *when they are questioned and disputable*, are to be disregarded in cases of partial and average losses. But taking these words literally, this is just as true of a total loss; for stipulations of value, if they were questioned and disputable, would be disregarded in case of a total loss, for the reason that they would fail to effect their purpose, which is to render evidence unnecessary by the definite and indisputable agreement of the parties. The rule that we should lay down is, virtually, the same for total loss and for partial loss, namely, that the agreement of the parties as to the value of the goods when it can be clearly understood, and definitely applied, should be regarded in one case as much as in the other. And then we say, that, when the only question in the case of partial loss is as to the proportion of the whole that is lost, the valuation of the whole remains unaffected.

<sup>1</sup> 1 Arnould on Insurance (Perkins's ed.), 310.

As valuation is effected in this country at this time, there would not often be much uncertainty about this. Valuation is usually upon goods of one kind, distinct from that upon goods of another kind, and is by quantity, weight, bale, or parcel. If, however, the valuation were entirely indiscriminate, as if the cargo consisted partly of iron, partly of piece goods, and partly of liquors, and the whole was valued at one whole round sum, and there was a partial loss of the piece goods of different kinds, it might be very difficult here to apportion the valuations among the different articles of the cargo, or indeed to make any use of it. It might be possible to ascertain the invoice cost of all the items, and by adding them together to determine the value of the cargo, and then the invoice price of the articles lost, and then say that the amount for which the insurers would be liable should bear the same relation to this invoice cost as the valuation of the whole bears to the invoice cost of the whole. We do not suppose, however, that this would be done, and wherever, by reason of such facts as are above supposed, or from any other causes, the application of the valuation to determine the liability of the insurers for a total loss would be difficult or uncertain, we suppose that both law and usage would disregard this valuation. We give in our notes the principal cases on this subject, reminding our readers that the general language used in some of the cases must be limited by a reference of it to the peculiar facts of those cases.<sup>1</sup>

<sup>1</sup> In *Lewis v. Rucker*, 2 Burr. 1167, a cargo of sugar was valued at thirty pounds per hogshead. A loss of about seventeen per cent occurred. It was held by Lord *Mansfield* that the underwriters should pay seventeen per cent of the agreed value. See also *Irving v. Manning*, 1 H. L. C. 287, 6 C. B. 396, 419. In two cases, *Usher v. Noble*, 12 East, 639, 646, and *Bousfield v. Barnes*, 4 Campb. 228, Lord *Ellenborough* explicitly declared that "the valuation in the policy is the agreed standard of indemnity which regulates the amount of average contribution. *Forbes v. Aspinall*, 13 East, 323, 327, often cited as a case in point. In *Tunno v. Ed-*

*wards*, 12 East, 488, in which sugars, the invoice value of which, together with charges, was £ 1,543, were valued at £ 1,500, no doubt seemed to be entertained that, on a loss of one half the sugars, the assured was entitled to half the sum at which the sugars were valued. In this case the prime cost was greater than the agreed value; but in *Goldsmid v. Gillies*, 4 Taunt. 803, where the invoice value was £ 2,720, and the agreed value £ 3,000, the same rule was adhered to, and the assured, on an average loss, was held entitled to recover from each separate underwriter a sum bearing the same proportion to his subscription as the percentage of loss

The valuation of freight is quite common, and has given rise to some peculiar questions. The general principle is, that the valuation of freight is construed and governed by the same rules which are applied to the valuation of other interests. The freight may be regarded as the profit of the ship; and as profits on goods are very often insured by a valuation of the goods which include them, so the freight may be insured, and often is, by a valuation of the ship, large enough to include it. But where the freight is valued under its own name, there is no more reason for setting it aside, because it is very large, than would apply to other interests. In one case, in Massachusetts, the valuation was regarded, although it was three times the actual value, on the ground that the court did not perceive that the estimate was made unfairly.<sup>1</sup>

ultimately sustained by the goods bore to the whole value in the policy. In *Harris v. Eagle Fire Ins. Co.*, 5 Johns. 368, where a policy of insurance against fire had been made on merchandise and utensils in a tobacco manufactory, among which were three hundred and eighty kegs of manufactured tobacco, stated on the back of the policy "as worth \$9,600," one hundred and fifty-seven kegs of which were destroyed by fire, it was held that the assured was entitled to recover for the loss of the one hundred and fifty-seven kegs according to the valuation of the whole number of kegs, and not the cost of the tobacco at the manufactory or the prime cost. *Brookes et al. v. La. State Ins. Co.*, 16 Mart. La. 640, 648.

<sup>1</sup> *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341. In this case insurance was effected upon ship and freight, at and from Amsterdam to Philadelphia, each subject being separately valued. On the voyage the ship suffered so much from tempestuous weather that she was obliged to go into an English port to refit. Her repairs exceeded half her value. While she was in port refitting, the assured offered to abandon ship and

freight to the underwriters. The abandonment of the ship was accepted, and a total loss paid. That of the freight was refused. The ship pursued her voyage, and delivered her cargo in good order at Philadelphia, and the freight earned was the same as if the ship had met with no disaster. It was held that the underwriters were still liable for a total loss of the freight according to the valuation in the policy, and this notwithstanding it had been greatly overvalued. On the point of overvaluation the opinion reads: "The facts agreed prove that the freight was greatly overvalued; and it is contended that the policy is to be opened. Overvaluation is not conclusive evidence that the policy was with a view to gaming or wagering. It does not appear, that, when this policy was subscribed, the plaintiff knew the quantity of goods which the ship was to take on board at Amsterdam, or the price which was to be paid for their transportation to Philadelphia. In this state of uncertainty, the parties agree that it shall be valued at a sum which eventually proves to be three times the value of the carriage of the goods. But we do not perceive that

We have seen that a question sometimes arises in the case of valuation of goods, whether the valuation applies to the whole of them or to a part of them, and a closely analogous question has arisen under the valuation of freight. Suppose a voyage to be from one port to other ports in succession, before it reaches the port of final destination. The freight is insured under a valuation. Is this a valuation of the freight earned in each of these successive voyages, or is it a valuation of the whole freight to be earned by the whole voyage? This question is, as the other was, a case of construction, and the determination of it may often be assisted by a consideration, not only of all the terms of the contract, but of the circumstances of the case. If the valuation be for the whole voyage, the whole may be lost as soon as the vessel sails, and the valuation of the whole continues in force until the end of the voyage. If, however, it be considered divisible among separate voyages, so much as is earned by the safe delivery at any port must be deducted from the valuation, because it is no longer at risk. If the freight be valued at a certain sum at and from the home port to a foreign port, and at and from that port to the home port, and the vessel arrives safely out and there earns and receives a freight equal to the whole valuation, and is lost on her return to the home port, the freight on which return voyage would have been the same that it was on the voyage out, it is obvious that there are two ways in which the loss might be adjusted. One would be to consider the valuation as applicable to the whole voyage; then half the valuation would have been earned, and the insurers would be liable only for the other half. The other way would be to consider that the valuation applied first to the voyage out, and then to the voyage home; and then, as the whole freight home was lost, the insurers would have been liable for the whole amount. In a case presenting precisely this question, the court adopted the latter view.<sup>1</sup>

the estimate was unfairly made. The defendants were willing to take the premium upon that amount; and we do not feel at liberty to disregard the agreement which was made by the parties to prevent litigation, and upon a good consideration."

<sup>1</sup> *Davy v. Hallet*, 3 Caines, 16. Two

policies being made on freight valued at \$12,000 in each, on a voyage from Teneriffe to Havana, and thence to New York, with liberty in one to stop at Matanzas, the vessel had freight for \$7,000 to Havana, which was paid on delivery of the cargo at Matanzas, where the consignee consented to receive it. The

If the policy on freight is on time, and the freight is valued, and within the period of insurance the vessel is to make many voyages, the similar question arises, — Is this a valuation of the freight for the whole time, or for each successive voyage? for if it be the latter, then the insurers are liable for the whole valuation in any one of these voyages, whether it be early or late, and whether much of the freight has already been earned and received or not. Here also the adjudications decidedly favor the view that the whole valuation applies to each successive passage.<sup>1</sup>

ship then proceeded to Havana, and there took a cargo for New York, for which the freight was to be \$420, and was lost on the passage. The question was made, whether only the freight from Teneriffe was insured. It was held, in New York, that the policy covered the freight from Havana, and judgment was given for the \$420, this being all that was demanded. *Hughes v. Union Ins. Co.*, 8 Wheat. 294.

<sup>1</sup> *Patapasco Ins. Co. v. Pisco*, 7 Gill & Johns. 293. In this case an insurance of \$1,000 was effected on freight valued at that sum, "laden or to be laden," at and from Baltimore to Aux Cayes, with privilege of another port, and at and from either back to Baltimore. Freight outward was paid at Aux Cayes, but on homeward voyage there was a total loss of freight, estimated at \$500. Valuation was held to apply to freight of each passage separately, and judgment was rendered for full amount of valuation. It must be borne in mind that in this case the premium was single, and the freight earned on the outer voyage was but half the amount of the valuation, and freight to the amount of the other half would have been earned on the return voyage; but the court held that the insured were entitled to recover the whole amount of the valuation, without deducting the freight earned on the outward voyage. We

are clearly of opinion that the case extends the rule much further than it is authorized by principle and authority. In *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429, there was no freight earned on the outward voyage, and this question did not arise. See also *Adams v. Penn. Ins. Co.*, 1 Rawle, 97. Mr. Phillips, Vol. II. pp. 28, 29, cites the referee case of *Peabody v. Salem Marine Ins. Co.*, Boston, 1839. In this case a policy had been underwritten on the freight of a ship "which was piratically taken possession of on the coast of Sumatra, and plundered of the specie remaining on board, when only a part of the homeward cargo had been laden. The master having thus lost his funds for the purchase of the remainder of a homeward cargo, and being able to find but a small quantity of goods on freight, came home with but part of a cargo, and the owners claimed for a loss on freight. The question was, whether the freight of a whole cargo, or what part of it, was at risk at the time of loss. As the particular voyage was described in the policy, and it was stated that the ship carried out specie, and as the premium was at a rate predicated upon the supposition of the whole freight being at risk, both outward and homeward, and as pepper was to be had on the coast, and, with specie on board to purchase it, the ship was more certain of a

We think the stronger reasons sustain this view, and that the practice is conformed to it. Mr. Phillips appears to incline to a different view, regarding the principle of indemnity as, if not requiring, at least more favored by supposing the valuation to be

return cargo than she could have been with a mere contract or charter-party for the supply of a cargo, the referees were of opinion that, equitably, at least, as between the parties to the policy, the freight of a whole cargo was at risk at the time of the piracy, and that the assured were entitled to recover for a loss of freight in the proportion of the deficiency of the homeward cargo."

Emerigon says: "The assured who has taken freights during the course of his trading voyage is presumed to have taken them for himself if the vessel arrive safe, and to have received them for account of the insurers if disaster renders abandonment necessary." C. xvii. § 9 (Meredith's ed.), 708. See *Meech v. Philadelphia Fire & Inland Ins. Co.*, 3 Whart. 473; *Adams v. Penn. Ins. Co.*, 1 Rawle, 97. The law is stated by Lord Mansfield as follows: "If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost; and by express agreement the parties may make the outward and homeward voyages one. Nothing is more common than two voyages; whenever there are two voyages, and one is performed, and the ship is lost on the homeward voyage, freight is due for the first." *Mackrell v. Simond*, 2 Chitty, 666. See also Molloy, de Jure Mar. Book 2, ch. iv. § 9; Malynes, p. 98. In the following cases it was held that the voyages were distinct, and freight was payable for those performed. *Mackrell v. Simond*, *supra*; *Brown v. Hunt*, 11 Mass. 45; *Locke v. Swan*, 13 Mass. 76.

In the late case of *Towle v. Kettell*, 5 Cush. 18, the charter-party described the voyage from Boston to Wilmington, N. C., and from thence to Cape Haytien in the island of Hayti, and from thence back to Boston. The clause relative to the payment of freight was as follows: "For the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say, fifteen hundred dollars, say so much in Hayti as the master may want for the disbursement of the vessel, and the balance on the discharge of the cargo in Boston, together with all port charges, lighterage, and pilotage in Hayti." The master was to have what freight could be got from Boston to Wilmington. The vessel was lost on her return voyage from Hayti to Boston. The Court held that the voyage was an entire one, and that no freight was due; that the provision for paying the master at Hayti what he might want for the disbursements of the vessel could not affect the construction of the instrument. In the following cases also the voyages were held to be entire: *Byrne v. Pattinson*, in K. B. Trin. T. 37 Geo. 3, *Abbot on Ship* 466; *Smith v. Wilson*, 8 East, 437; *Coffin v. Storer*, 5 Mass. 252; *Liddard v. Lopes*, 10 East, 526; *Scott v. Libby*, 2 Johns. 336; *Barker v. Cheriot*, 2 Johns. 352; *Penoyer v. Hallett*, 15 Johns. 332; *Burrill v. Cleeman*, 17 Johns. 72; *Blanchard v. Bucknam*, 3 Greenl. 1; *Hamilton v. Warfield*, 2 Gill & J. 482. See also *Gibbon v. Mendez*, 2 B. & Ald. 17; *Crozier v. Smith*, 1 Scott, N. R. 338; *Sweeting v. Darthez*, 14 C. B. 358.



applied to the aggregate freight of the whole voyage.<sup>1</sup> It may be so in some cases, if the valuation is taken to be the estimate by the parties of the whole freight to be actually earned. But as the conclusiveness of an honest valuation is now conceded, and is with every day's practice more firmly established, we do not see why we should go behind it, to look into the question of actual indemnity, in cases of this kind. It is not likely that this question will often arise; for as, in the valuation of goods, it is now usual to value them separately or in classes, so where the freight is insured for successive voyages, under a valuation, words are usually employed which determine whether the valuation applies to the several passages, or to the aggregate of the whole voyage. And where the policy is on time, and the freight is insured under a valuation, we believe the rule that this valuation applies to each passage would not only be found convenient for settlement, but being established, and therefore well understood, and held in view by the parties in making their contract, it would, on the whole, work justice.

The valuation of the freight of a ship is the valuation of the freight that the ship would earn by carrying a full cargo, or by letting to charter her whole burden. If it be other than this, it must be so expressed in the policy. The question may then arise, whether the whole of the interest included in the valuation was ever at risk, as, in the case of valuation of goods, it may be shown that only a part of the goods included in the valuation are on board, and then only a proportionate part of the valuation would apply. So, if the freight of the whole ship be valued, it may be shown that the ship had on board only a part of the cargo, by the carrying of which the freight to which the valuation applied was to be earned, and then the valuation would be diminished *pro rata*.<sup>2</sup>

<sup>1</sup> 2 Phillips on Ins. § 1208.

<sup>2</sup> In *Forbes v. Aspinall*, 13 East, 824, it was held that, "the valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if by a peril insured against the ship be lost when part only of the goods, the freight of which was intended to be covered, was on board,

the valuation must be opened, and the assured can only recover for that proportional share." In the case at bar, freight valued at £ 6,000 was insured on a ship from any port or ports in Hayti to Liverpool; and the ship which had sailed with goods from Liverpool to Hayti on a trading voyage, after exchanging part of her outward cargo for fifty-five bales of cotton at one



There may be a valuation of profits, although, as we have already said, this is now most frequently effected by a valuation of the goods. We suppose it to be seldom that profits are insured in an open policy. Where they are, and a loss takes place, the ordinary means of determining the amount of the loss must be resorted to; and it is because these are so difficult in their application, and uncertain in their result, that this mode of insurance is not often adopted.<sup>1</sup>

port of Hayti, proceeded with the same to another port, for the purpose of making similar barter with the rest of her outward cargo, but was lost by peril of the sea before it was effected; the assured were held only entitled to recover the freight of the fifty-five bales of the return cotton on board, though there was a moral certainty at the time that the remaining part of the outward cargo would, except for the loss, have been exchanged for a full return cargo. This case has been confirmed in *Mass. Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429. In *Riley v. Hartford Ins. Co.*, 2 Conn. 368, freight on goods "laden or to be laden" was insured to the amount of \$2,000 on a voyage from New Orleans to Gibraltar, with liberty to go to Cape de Verde for salt, and back to the United States; the vessel arrived safely at Gibraltar, took in a quantity of freight less in value than the amount of the policy, and then sailed for Cape de Verde for the purpose of investing the residue in salt, but, before her arrival there, was wrecked and lost. It was held, that the insured were entitled to recover only the freight of the goods on board. *Montgomery v. Egginton*, 3 T. R. 362. This was an action by the assured on a policy of freight valued at £1,500. In fact, only £500 worth of freight was on board when the ship was

driven from her moorings and lost. But goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for the purpose at the time. Lord *Kenyon*, before whom the case was tried, told the jury that the question for their consideration was, whether this was a mere colorable insurance and a gaming policy, or whether it was a *bona fide* transaction; if the latter, the assured was entitled to recover for the whole value of the policy. The jury found for the plaintiff for the whole sum. This verdict was sustained by the whole court.

<sup>1</sup> In *Mumford v. Hallett*, 1 Johns. 433, it was held that "every policy on profits must of necessity be a valued, and not an open one." In this case a printed blank policy on cargo was used, and the blank filled up for an insurance on profits, and the valuation in writing, when taken in connection with the printed words, was a valuation of the goods, and not of the profits. The court said: "Though the profits are not valued, yet every such insurance must of necessity be considered as a valued, and not as an open policy; especially if the goods themselves, as in the case here, are valued. If it were otherwise, it would be next to impossible to prove their value, as is done in regard to vessels and cargoes. In those cases it is easy to show what the different subjects cost, but how are you to ascertain

If the profits be valued, the valuation has no force in England, unless the insured can show, first, that he has goods on board, and next, that had these goods arrived safely he would have made some profit. Then he may stop, for the valuation comes in and determines how much profit he would have made, and consequently how much he has lost.<sup>1</sup>

In this country, however, he needs only to prove that he had goods on board, for the law assumes, that, had they arrived safely and where intended, he would have made some profit, and then the valuation comes in and determines the amount of this profit.<sup>2</sup> We think the American rule rests upon better reasons.

what is often imaginary and must depend on so many contingencies?" See also *Riley v. Hartford Ins. Co.*, 2 Conn. 368, *supra*.

<sup>1</sup> *Barclay v. Cousins*, 2 East, 544; *Hodgson v. Glover*, 6 East, 316. In this case, upon an insurance upon profits valued at £ 400, where the plaintiff declared as for a total loss, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were there sold, and it did not appear what profit was made of them, or whether, if all had arrived, any profit would have been made, although it was found that the produce of those who were sold did not give a profit upon the whole adventure, held, that the plaintiff was not entitled to recover. *Eyre v. Glover*, 16 East, 218.

<sup>2</sup> *Patapasco Ins. Co. v. Coulter*, 3 Pet. 222. This was a case of insurance on profits on board the ship *Mary*, at and from Philadelphia to Gibraltar, &c. The insurance, \$ 5,000, declared to be on profits valued at \$ 20,000. The vessel proceeded to Gibraltar with a cargo of flour, which was there to be sold, and the proceeds to be invested at Marseilles in dry goods. While at Gibraltar, before the discharge of her cargo,

the vessel was destroyed by fire. The case being heard on error, the court by Mr. Justice *Johnson* said: "The third prayer for instruction is in these words: 'that the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and that therefore they were not entitled to recover.'" This was refused, and the question is, whether the defendants were entitled to it, as prayed. This instruction presents two propositions: 1. That it was necessary to prove loss of profits, otherwise than by loss of the cargo. 2. That the plaintiff was limited to proof of profits on a sale at Gibraltar. With regard to the second, it is clear that the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty. Courts of justice have got over their difficulties on the question whether profits are an insurable interest, but how and where that interest must be established by proof in case of loss is not well settled. Here, again, there appears to be a conflict between the British and American decisions. The earliest of the British

If there were a partial loss of the goods, and the residue arrived, and were sold at a loss, making absolutely no profit, and then the insured should claim under his valuation for a proportionate part of the profits, on the goods lost, this would seem to be inequitable. No American case has gone so far as this, and indeed the assumption on which the American rule rests, that the goods would make some profit, is defeated by the facts, and it might well be that the valuation would not be applied. If, however, the goods which did arrive paid any profit, the valuation should stand. The insurers

decisions, that of *Barclay v. Cousins*, 2 East, 544, certainly supports the doctrine that the profits sink with the cargo or at least that the loss of one is *prima facie* evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court, p. 551, and the recovery was had in that case, without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson v. Margetson*, 2 East, 549, of which a note is given in that case, the recovery was also had without proof that profits would have been made, or any other proof than an interest in and loss of the cargo; and Lord *Mansfield* seems to have suggested the true ground for dispensing with such proof, to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port. The two subsequent cases which are cited in the elementary books to sustain the contrary doctrine are not full to the point. In that of *Hodgson v. Glover*, 6 East, 316, there was another question of as great difficulty, to wit, whether in a clear case of average loss the plaintiff could recover as for a total loss, or recover everything without evidence to determine the average. Of the four judges who sat, two decided against the plain-

tiff upon the one ground, and two upon the other. In the second case, that of *Eyre v. Glover*, 11 East, 218, although the point was touched upon in argument, yet the court neither expressly affirmed nor denied it; it was not the leading question in the case; and at last judgment was rendered for the plaintiff without requiring such proof. But the case of *Mumford v. Hallett*, 1 Johns. 439, goes further. It was a case of insurance upon profits, in which there was no evidence given that profits would have been made upon an arrival, nor was any other loss proved than an incident to the loss of the goods. On that state of facts, *Livingston, J.*, who delivered the opinion of the court, remarks: "It does not follow that a profit will be made if the cargo arrived, yet its loss would give a right to recover on such a policy. There are other questions in the case; but, after all were settled, this principle was essential to the plaintiff's right to recover. In the case of *Fosdick v. The Norwich Ins. Co.*, decided in Connecticut, 3 Day's Rep. 108, the question was moved in argument, that to justify a recovery the plaintiff must show that profits would have accrued upon the safe arrival of the goods; but the language of the court, in expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the

would gain by it if the profit made were beyond the valuation, and the insured would gain if they were below the valuation.

If the loss were total, as by the total loss of the ship, it would be impossible to say with any certainty when the ship would have arrived but for the loss, or what market it would have found. In point of fact, goods do generally sell for a profit; for, if they did not, the whole commerce of the world would be at an end; and a presumption of this fact is therefore reasonable. And then the valuation of profits, like that of other interests, determines the amount.

It must, however, be remembered, that, as in the case of valuation of goods and of freight, it may always be shown that a part

proof of loss as to the insurable interest. Yet, the right of the plaintiff to recover being affirmed in that case without other proof than the loss of the goods, this would seem to be an authority for the doctrine that no other was necessary. The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the case, the chief justice asks 'if profits are anything more than an excrescence upon the value of the goods beyond the prime cost.' In the case of *Abbott v. Sebor*, 8 John. Ca. 39, which was a motion for a new trial, the decision turned chiefly on the question, whether the court had misdirected the jury in instructing them that the plaintiff must recover the whole sum insured on profits or nothing. That is, that he could not recover for an average loss. The question, if proof that profits would have been made had the vessel arrived in safety was necessary to his recovering, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required, beyond the loss of the goods on

which the profit was expected. But the authority amounts to no more than an implication. We must now dispose of the question upon reason and sound principle; and here it seems difficult to perceive why, if profits be a mere excrescence of the principal, as some judges have said, or an incident to or identified with it, as others have said, the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it, of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain, and in each case, the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation, or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it, would have been subjecting the rights of the plaintiff to mere mockery. On this point we support the American decisions."

of the subject-matter included in the valuation was not at risk, and then the valuation is diminished proportionally, so it would be in the valuation of profits. Thus, if the freight of five hundred bales of cotton was insured under a valuation of the whole, and only two hundred and fifty bales were on board, only one half of the valuation would be taken. But it would always be a question, partly of construction, partly of fact, whether it was not the intention of the parties to apply the valuation to the profits on property on board. It is no uncommon thing for insurance to be effected on an interest "to be thereafter declared and valued." Such an insurance is usually on goods. We know not why, however, if the parties saw fit, it might not be made on other interests. Under this kind of policy it has been held, that, if the kind and value of the goods are declared before the loss occurs, it is a valued policy; but if they are declared and valued after the loss occurs, the declaration is sufficient to make the policy attach, but the valuation is set aside, and the case is treated as an open policy.<sup>1</sup>

Where the insured made a mistake in declaring and valuing under such a policy, he was permitted to correct it without the assent of the insurers.<sup>2</sup> We know no good reason for treating a mistake of this kind in any other way than that in which other mistakes in the policies are treated.

It need hardly be added that a valuation, if intended to cover an illegal interest or an illegal risk, is wholly void. Of the effect of a valuation on a constructive total loss, we shall treat in connection with that subject.

<sup>1</sup> In *Harman v. Kingston*, 3 Campb. 150, Lord *Ellenborough* said: "I have now fully made up my mind, that where there is an insurance on goods" as may be thereafter declared and valued, this gives the assured a power, by duly declaring and valuing before the loss, to make it a valued policy; but if the insured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial.

<sup>2</sup> In *Robinson v. Touray*, 3 Campb. 158, it was held, that where there is a policy on goods by ship or ships to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials, he may afterwards, in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters.

## CHAPTER VIII.

## OF PRIOR INSURANCE.

IF the same property could be insured against the same risks by different insurers, it is obvious that there would be great danger of fraud. The insurers might not know the policies of other insurers. It is mainly to guard against this danger that the marine policies of the United States usually contain an express provision that the insurers shall be liable for only so much of the property as the prior insurance fails to insure.

The intention of this is obviously to make the second policy attach only to the excess of interest remaining uninsured after the first policy; and the third policy to attach to a similar excess remaining after the second; and so on for succeeding policies.

The priority respecting which this provision is made is not a priority as to the beginning of the risk, but a priority in effecting the insurance, and is determined by ascertaining the actual time of making the contract. For this purpose the date is *prima facie* evidence, but not conclusive, for it may be contradicted by proof that the contract was made on another day.<sup>1</sup> It is a general

<sup>1</sup> Lee v. Massachusetts Fire & Marine Ins. Co., 6 Mass. 208. In this case it appeared on the trial that the plaintiff with others was interested in a shipment of merchandise valued at \$38,000; that the whole body of owners effected an insurance on the shipment as a whole to the amount of \$32,000. This policy was underwritten by different individuals, who took shares at different times. The plaintiffs alone procured an insurance from the defendants on their separate interest, and allege that at the time of the making of the policy, the one now in suit, the amount

underwritten on the general policy did not exceed the sum of \$10,000. The defendants' policy contained the usual clause as to prior insurance, and on the strength of it they resisted payment, alleging that the plaintiff's interest was covered by the general policy, which bore date October 31st. Mr. Justice *Seawall* delivered the opinion of the court, from which the following extracts are taken: "In the case at bar, two policies — the joint and the separate policies — are before us. Taken together, the sums insured upon the same risk, described alike in both instru-



principle of law, that the fractions of a day are not regarded; but if two or more policies are made on the same day, insuring the

ments, do not exceed the full amount and value of the interest and property of the parties insured, who are named in the two policies, all of them in one, two only of the concerned in the other. What amount had been insured upon the joint policy when the separate policy was effected? If a greater amount than \$10,000 had not been then subscribed, the defence fails in the other view which has been taken of it. The defendants suppose this question determined by the written date of the joint policy, and by the words cited in the policy in the case at bar, particularly to the reference to policy prior in date. The plaintiffs contend that this reference is, constructively, to a policy prior in effect, of which the written date is only the presumptive evidence, liable to be controlled by other evidence, when it can be had, of the actual subscriptions of each underwriter. The general principle is, that every subscription is a new contract. Marshall (p. 241) states this in speaking of the importance of the true date, when necessary to compare it with the dates of facts connected with the transaction; and in this view of the subject he commends the practice in England, where each underwriter dates his own subscription. By the true date, in contradistinction to some other date, he must intend the time of the transaction, as distinguished from any date which may be affixed to the writing containing the contract; and because this last is presumptively the time of the transaction, as distinguished from any date which may be affixed to the writing containing the contract; and because this last is presumptively the time of the transaction, although liable

to be controlled when it is not truly so, he commends the practice which avoids a general date, and gives to each contract, made by every distinct subscription, its true date. The rules of law as applied in construing the dates of other instruments, even the most solemn, such as deeds and writings under seal, certainly are, that the written date is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proved by extraneous evidence, notwithstanding a written date. A deed, and without doubt a policy of insurance, executed without any written date, are nevertheless valid; and the latter may happen to be a policy of a prior date within the meaning of the stipulation cited, that is, an insurance by a prior transaction." *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. Reps. 419, was an action on a policy of insurance from the Cape of Good Hope to Philadelphia, with a clause in the policy, that, if insurance on the policy had been made previously, it should be void as to all property covered by a prior insurance; and so much of the premium as would be proper should, under such circumstances, be returned. At the time the policy was signed, a memorandum was made by the president of the company, stating that, in case insurance on the property was made in England, where it had been ordered, it should supersede so much of the insurance as was covered by the policy, and one per cent of the premium should be retained. Insurance on the same property was made in England eight days after the policy was underwritten by the defendants. Held, that the terms of the memorandum do not alter the



same property against the same risks, and the question of priority is material, this priority will be determined by ascertaining when on that day the first was made.<sup>1</sup> If the whole property be covered by the first policy, there is of course nothing to which the second policy can attach. It has been held, however, that the second policy is not thereby necessarily avoided, but may be only suspended; for if, during the continuance of the period for which the second policy should attach, the first policy ceases to attach because it is exhausted, or for any similar reason, the second policy now attaches.<sup>2</sup>

stipulations in the body of the policy, and that the whole loss is payable by the defendants.

<sup>1</sup> In *Potter v. Marine Ins. Co.*, 2 Mason, 475, two policies had been executed on the same day. *Story, J.*: "In my judgment, there is no difficulty in the question stated at the bar. I have no doubt that it is competent in all cases, where the priority clause in our policies renders it material, to inquire into the actual fact of prior execution. The law, when it is material, will examine into fractions of a day, and give the parties their rights accordingly. In this case, therefore, I shall admit the evidence of the actual time of the execution of the two policies. If one was executed in point of fact before the other, though both bear the same date, the plaintiff is entitled to recover upon the first policy only, as that is more than sufficient to cover all his uninsured interest; since by the very terms of the common clause the underwriters on the second policy are liable for so much interest only as is uncovered by any prior policy." This same question was considered in *Brown v. Hartford Ins. Co.*, 3 Day, 58. The court say: "It was evidently the intention of the contracting parties in these policies to avoid the inconvenience of contribution, by making the insurers liable in the order of

time. This was anciently the law in England; modern practice there had introduced a different rule. The parties intended, by inserting the clause in question, to abolish the modern, and restore the ancient rule. This being their object, it is unreasonable to suppose that the parties, while thus attempting to alter the rule, should leave a portion of time, viz. a day, subject to the inconvenience of a rule they evidently intended to avoid. . . . We are, therefore, of opinion, that the expression 'prior in date,' as used in these policies, is equivalent with *prior in time*; and that it was, of course, competent for the defendants to aver and prove the precise time of execution." Judgment of court below affirmed.

<sup>2</sup> *Kent v. Manufacturers' Ins. Co.*, 18 Pick. 19: "Two days before the expiration of a policy, fully insuring a vessel on time, the defendants made a policy, insuring the same vessel, at and from Boston to Charleston, the second policy providing that, if the assured should have made prior insurance upon the vessel, then the defendants should be chargeable only for so much as the amount of such prior insurance should be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another. The vessel sailed

In all that is said of prior and subsequent policies, whether in reference to the clause above mentioned, or where that clause does not exist, that only is a prior policy, in this sense, which is a policy whereby the same party is insured on the same property or interest, and against the same risks. It is obvious that the owner of different articles of property, or of different interests in property, may insure them in different policies against the same risks; and that he may insure the same property or interest against certain risks in one policy, and against other risks in other policies.

If there be property more than enough for the first and second policies to attach to fully, and the policies are such that if any part of the property were lost, there would be a claim under one of the policies or either of them, and the property is diminished by its removal from the vessel, or any part of it is in any way withdrawn from the risks insured against, if there remains as much on board, at those risks, as both policies will cover, they both continue to attach to their full amount. If there be many policies, and property enough when all attach for all to take effect, and the property is afterwards so far diminished that it is less than the amount of all the policies, the effect of this diminution is not quite determined. By one construction, the last policy is first discharged, and then the last but one, and so on as the property lessens. By another construction, if, when all the policies are made, there is enough property for all the policies to attach, the attachment of all continues while any of the property remains; and any diminution in the property is applied *pro rata* to all the policies.<sup>1</sup>

from Boston before the expiration of the first policy, but was lost after it had expired. It was held that the second policy attached, notwithstanding the first policy continued in full force till after the vessel had sailed from Boston, and the defendants were consequently liable for the loss. See also *Murray v. Ins. Co. of Penn.*, 2 Wash. C. C. 186; *Lee v. Mass. F. & M. Ins. Co.*, 6 Mass. 208.

<sup>1</sup> This question was discussed at great length and with much ability in the case of *American Ins. Co. v. Griswold*, 14 Wend. 399, and the first rule laid down

in the text was adopted by the Supreme Court, and the decision was sustained by the Court of Errors. But Senator Tracy gave a very able dissenting opinion in favor of the second rule in the text, and his opinion is favored by Mr. Phillips, 2 Phillips on Insurance, § 1261. The question depends entirely upon the construction of the American clause. And it appears that either rule may be drawn from it without doing violence to the language.

In favor of holding the first insurer liable to the full extent of his insur-

The determination of this question must depend upon the construction of the "American clause," as it is called. This is

ance, although a part of the cargo had been taken away, it was urged that the old English rule and the Continental law substituted the second underwriter in place of the insured, as to the interest not covered by the first policy, so that the liability of the first underwriter was in no way affected by the second insurance; that the modern English rule was introduced by Lord *Mansfield* in *Newby v. Reed*, 1 W. Bl. 416, and adopted in this country in *Thurston v. Koch*, 4 Dallas, 348, and that the American clause, introduced immediately after the latter decision, was obviously intended to restore the old rule, and that such intention was expressed in the clause in appropriate and explicit language.

On the other hand, it was urged, and, as we think, shown, in the dissenting opinion, that the words of the clause would be satisfied by exonerating the subsequent insurers in those cases only in which there was not property enough at the commencement of the risk for all the policies to attach; and that there was an obvious want of equity in taking the burden from some of the insurers and imposing it upon others, in a case where all are allowed to retain the premiums. If it can also be shown that the old English rule was confined to cases in which all the policies could not attach at the commencement of the risk, and did not apply to a case like the present, the better rule would seem to be to require the insurers to pay in proportion to the amount subscribed by each. And such we are inclined to think is the case.

It is clear that the application of plain common-law principles to several con-

tracts of insurance against the same risk would require an equal distribution of the burden, and such the law seems always to have been, unless affected by some custom of merchants. *Malynes*, the oldest authority, speaks of the practice of exonerating the subsequent insurers as "a rare custom of merchants," and says, "and so a law not observed is inferior to a custom well observed," plainly intimating that the practice was not in conformity with the old law. *Malynes*, *Lex Mercatoria*, 112. So in *The African Co. v. Bull*, 1 Show. '132, the custom was specially pleaded. Thus, both the authorities cited to support the old rule admit it to be an innovation upon the common law which would have held them all equally liable. If this be so, the English rule would extend no further than the custom. But both the authorities above cited extend the custom only to cases in which the policy never attaches, so that the premium is returned by the subsequent insurers. *Malynes* says: "The custom is, that those assurers that have last subscribed to the policy of assurance bear not any adventure at all, and must make restitution of the premium by them received." In the case in 1 Shower, the reasonableness of the custom is defended expressly on the ground that the subsequent insurers return the premium. There is no evidence whatever that the custom was ever extended to a case where all the policies have once attached, and a right to retain all the premiums accrued.

We have the more confidence in this view of the question, because the adjudication in *American Ins. Co. v. Griswold* appears to be reconcilable with

expressed with some variety in the language in different policies. A form in frequent use, which we suppose to be substantially the same with that generally used, is as follows: "If the assured shall have made any other assurance upon the subject insured prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the subject insured; and shall return the premium upon so much of the sum by them assured as they shall be, by such prior insurance, exonerated from; and in case of any insurance upon the subject-matter, subsequent in date to this policy, the assurers shall, nevertheless, be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made." The question would seem to be, Is this clause applied only to determine

it. As that was a trading voyage, and a relative proportion of the premium was to be returned for each month which was not commenced, it might have been said that the last policy had not attached, and that the premium must be returned; and such appears to have been the opinion of Chancellor *Walworth*, 14 Wend. 483. That decision did not extend the rule beyond a time policy on a trading voyage with this clause, for the return of premium, which is an equivalent to several insurances, one on each of the separate passages. It is true that Mr. Justice *Story*, in *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, assumes that the amount of the prior policy remains the same; but this assumption is but an *obiter* expression of opinion. See the remarks of Mr. Senator *Tracy* on this point on page 506 of the report.

In the late case of *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, the owner of a vessel insured her on different days in three different offices. The vessel was valued at \$ 22,000 in each

policy; \$ 7,300 was the amount insured in the first and second offices, and \$ 7,400 the amount in the third office. Each of these policies was for the same period, and covered the same risks, and each contained the American clause. The vessel sustained a loss to the amount of \$ 2,189.04. Suits were instituted against all the offices, and a recovery was had against the first office for the whole amount of the above loss, and it was paid in full. During the trial of that case no question was made of the proportionate or *pro rata* liability of the defendant company, and on satisfaction of the judgment the insured paid to the second company the premium, which was the consideration for the insurance made by that company. It was held in a suit brought against the second company that the American rule did not apply in a case like this, where there was no double insurance, that each company was liable *pro rata*, and that the fact that the first company had paid more than its proportion was no defence to a suit against the second.

whether, and on what, the policies attach? and is its effect then exhausted, or does it continue until the termination of the risks; and operate if there be a diminution of the property at any time during those risks? Perhaps it may help us, to look, in considering this question, to the provision for the return of premium. There can be no doubt that if the first policy exhausts the property, so that the second policy does not attach in whole or in part, the premium for so much of it as does not attach must be returned. But does this provision extend to the case where both policies do attach in full, and at a later period there is a diminution of the property? If the premium be then returnable, it must be *pro rata*, not only as to the property, but as to the time.

Now it is a nearly universal rule of the law of insurance, that if the property on which the insurance is made once attaches, and the whole of it is for any time under the risks insured against, there is no return of premium. And an argument of much force was drawn by Mr. Senator Tracy against this entire exoneration of a subsequent policy, on the ground that a continuance of a premium in all the policies carries with it, by a necessary implication, the continuance of an attachment of all the policies, and thence it would follow that the diminution of the property should fall, *pro rata*, on all the policies. We have but one authoritative decision of the question, and that is by the Supreme Court of New York, confirmed by a very great majority of the Court of Errors. This decision adopts the rule, that prior insurers continue to be held for the whole of the property remaining, and the subsequent insurers are discharged when the property thus remaining is not sufficient to reach them. We are not aware of any established practice opposed to this rule, and must regard it as in force in the United States. But, while the question is certainly one of much difficulty, we are unable to regard the reasons which sustain this decision as of greater weight than those which oppose it. It must be admitted that in the case referred to, which covers more than one hundred pages, the question is discussed with great ability and learning.<sup>1</sup>

<sup>1</sup> American Insurance Co. v. Griswold, 14 Wend. 399. It was held in this case that the assurer of goods to a specified amount, on a time policy, is liable to the full amount of his subscription, if, after landing a portion of the cargo, the remainder is totally lost by one of the perils insured against,

Policies which do not contain this clause are regarded, if for the same parties, on the same property, and against the same risks,

provided that, at the time of loss, there are goods on board to an amount equal in value to the sum insured. Nor can such assurer claim contribution from subsequent assurers, where the policy contains the American clause. (Mr. Senator *Tracy* dissenting.) The case was first tried in the Supreme Court, whence it was brought on error to the Court of Appeals. The facts were as follows: "The plaintiffs in error on the 17th May, 1824, insured the Messrs. Griswold in the sum of \$ 20,000, for eighteen months, on the cargo laden and to be laden on board of their ship *China*, bound on a trading voyage, with the usual liberties of touching and trading at any ports. The policy contained the American clause. Goods to the value as per invoice of \$ 47,096 were shipped on board, and the vessel sailed for South America. The defendants in error procured from the Atlantic Ins. Co. on the same cargo insurance to the amount of \$ 10,000, policy bearing date 18th May, and still another from the Niagara Co. for \$ 15,000, policy being also dated 18th May, both for eighteen months. The latter policies of similar tenor and effect in all respects as prior policy, except as to date. On the 3d of November the vessel was seized at Callao, where she had previously disposed of \$ 21,000 worth of her cargo. The remainder of her cargo was totally lost to its owners, and was duly abandoned to the underwriters. An insurance broker apportioned the loss among the three companies, in proportion to the amount each had underwritten. On these terms the two last companies settled the demand against them, but the American company refused payment. Action

was accordingly brought in the Supreme Court, and a verdict entered by consent for the plaintiffs, subject to an adjustment to be made by the broker. Difference of opinion occurring in the hearing before the broker, that party submitted the whole matter for the consideration of the Court of Errors, with three statements: the first of which was the original one above referred to; the second, with \$ 2,014 in specie on board at time of loss, charged to the defendants; the third, making the defendants liable for the full amount subscribed by them." From the elaborate arguments we condense the following: On the part of the assurers it was contended, first, that they are only liable to pay such proportion of the loss as \$ 20,000, the amount of their policy, bears to \$ 47,096, the amount on board the ship when she sailed. To this it was replied that "the assured are entitled to a full indemnity to the whole amount of their interest on board at the time of loss, without regard to any further interest originally uncovered by any policy, and afterwards discharged from the ship." In *The Columbian Ins. Co. v. Catlett*, 12 Wheat. 390, Mr. Justice *Story* intimates to the contrary, but the point did not arise legitimately, and was not settled there. The principle has been fully recognized in *Davy v. Hallett*, 3 Caines, 21, where *Kent*, C. J., says: "The present case is analogous to that cited in 2 Valin, 87, and 2 Emerigon, 39, 40, in which one caused an insurance to be made to the amount of 1,000 livres upon goods on board a vessel from America to Marseilles. The vessel sailed with a cargo to the amount of 3,000 livres, discharged at Cadiz two



very much as if they constituted one policy. In that case the insured may recover his whole amount from any one or more whom

thirds thereof, leaving goods on board for the remainder of the voyage to the amount of the insurance. It is the opinion of these authors, and the same is confirmed by Pothier, that the policy was not thereby reduced two thirds in value, but operated still upon all the cargo on board the amount of the 1,000 livres." *Gardner v. Smith*, 1 Johns. Cas. 143. The insurers would tie down the risk to the state of the interest as laden on board the vessel at New York, and then cut it down as fast as any interest is discharged. An attempt was made to establish this erroneous position in the case of the *Columbian Ins. Co. v. Catlett*, in the Supreme Court, U. S. But the whole reasoning of the court goes to repel it on every policy whatever, and reference is made to Mr. Justice *Story's* opinion. The counsel next insisted that the assurers were responsible to the whole extent of the sum assured, in consequence of the clause relating to prior and subsequent insurances, and in support of this cited *Col. Ins. Co. v. Catlett*; *Watson v. Ins. Co. of N. A.*, 3 Wash. C. C. 89; *McKim v. The Phoenix Ins. Co.*, 2 Wash. C. C. 186; *Kenny v. Clarkson*, 1 Johns. 386; *Kane v. Comm. Ins. Co.*, 8 Ib. 229; *Minturn v. Columbian Ins. Co.*, 10 Ib. 75; *Seamans v. Loring*, 1 Mason, 128. The argument concludes as follows: "The adjustment of the loss must be made up by taking the amount on board at the time of loss. If it was equal to the sum covered, the insurers are liable to pay that amount. It is altogether immaterial whether the proceeds of that part of the cargo sold at Callao are taken into account or not. There was still enough left on board of the original in-

terest to keep the policy full. The plaintiffs are therefore entitled to judgment for \$ 20,000."

For the insurers it was contended that the insured have a right to recover only such a portion of the sum insured as the amount of the policy bears to the amount of the whole cargo, and the argument was mainly confined to an examination of cases and points advanced by the counsel for the insured.

Mr. Chief Justice *Savaye*, after stating that he considers the only great point to be as to whether the insured can recover the full amount named in their policy, proceeds to elaborately consider the points involved, giving judgment for the insured for the whole amount of their policy.

In the Court of Errors there seemed to be a general opinion in favor of sustaining the conclusion arrived at below. The chancellor's opinion was concurred in by twenty senators, while Senators *Tracy* and *Jones* dissented.

In his dissenting opinion, Senator *Tracy* says, page 504: "It seems to me, then, that in determining — as it is agreed on all hands it must be determined — that the American clause does not change the rule of contribution as to a partial loss, by all the interests on board, it must also be determined, as a consequence, that the common-law principle of contribution is as applicable to all losses upon the common subject at risk, and to which the several policies have once attached, as it would be if the clause did not exist, — in short, that every diminution of the insured interest, after the risk has commenced, is a diminution *pro rata* for the equal benefit of all the insurers; and therefore the



he elects to sue. But he cannot recover from all the insurers more than the amount of his loss.

This rule implies and is founded on the supposition that all the insurers guarantee each other;<sup>1</sup> and when an insured is already insured to the full amount of his property, and he gets further insurance, this is in fact an insurance of his prior insurance. And the different insurers have among themselves a right of contribution. Each one should pay to the insured the proportion which all that he insured bears to the whole amount on that property, and whoever pays to the insured more than that proportion may recover from the other insurers the shares which they must severally contribute, to make each lose his due proportion.

The same rule holds in case of a return of premium for short property. In case the whole property insured is less than the

subsequent loss of a part only in value of the original value, to which the insurance applied, although it be the whole value then at risk, is necessarily in the nature of a partial loss, because it is in fact but a partial loss of the whole interest insured. That this was the construction given to the policies by all the parties to them, is, I think, sufficiently maintained. The loss was adjusted on the principle of equal liability, and so preferred by the insured as their claim against the respective insurers. And, more than all, the claim was compromised and paid by the subsequent insurers on the principle on which it was adjusted by the broker. Perhaps the circumstances of the compromise with the Atlantic and Niagara Companies prevent the plaintiffs in error from availing themselves of the sums they paid, notwithstanding those sums and the present judgment give to the insured more than their loss; but the fact that these companies have paid on the principle of a distribution loss furnishes the most striking evidence of the construction which all the parties have given to these policies, and places the

insured in the singular attitude of claiming for the subsequent insurers an exemption which they did not ask, which, because they did not possess, the insured has induced them to pay, and which it will not avail them now to have established."

<sup>1</sup> *Newby v. Reed*, 1 W. Bl. 416; *Godin v. Lond. Ass. Co.*, 1 Burr. 489, 492; *Rogers v. Davis*, 1 Beawes, Lex Mercatoria, 342, cited *Marsh. Ins.* 147, and *Park on Ins.* 374; *Davis v. Gident*, *Ib.* 375; *Thurston v. Koch*, 4 Dall. 348; *Craig v. Murgatroyd*, 4 Yeates, 161; *Cromie v. Kentucky and Louisville Mut. Ins. Co.*, 15 B. Mon. 432; *Lucas v. Jeff. Ins. Co.*, 6 Cow. 635; *Millaudon v. Western Mar. & F. Ins. Co.*, 9 La. 27. See *Am. Ins. Co. v. Griswold*, 14 Wend. 399, cited in the preceding notes; *Kemble v. Bowne*, 1 Caines, 75. In France over-insurance is not permitted. *Code de Com.* a 359. The effect of the late decision in *Fisk v. Masterman*, 8 M. & W. 165, may be to confine the application of this rule in England to cases in which all the underwriters subscribed before the risk commenced. See next note.

amount insured upon it, the different insurers where there are many policies contribute ratably to the return of premium. A recent English decision would seem to add a new limitation to this right of demanding contribution, or this obligation of returning premium. Where certain insurers insured nearly the whole property, but there was enough for all of the policies to attach, and on a later day other insurers insured an additional amount on the same property, and the whole insurance thus effected amounted to an over-insurance, it was held that there was a time when all the property insured by all the first insurers was at the risks insured against, and they should therefore not be held to a return of premium, but that the insurers of a later day should return the premium for all the property to which their policy did not attach, by reason of a previous insurance.<sup>1</sup>

As the clause above referred to applies only to prior and subsequent policies, it has of course no application where the policy is simultaneous; and the law applicable to simultaneous policies is the same with that above stated as the law of successive policies where this clause is not contained.<sup>2</sup> That this rule may be applied, policies are not unfrequently declared to be simultaneous; and if so declared they would be so held, even if they were made on different days, and bore different dates; for it would then be regarded simply as an agreement by the parties that policies should be treated as if they were simultaneous, and this agreement they had a right to make.<sup>3</sup>

If nothing was said about their being simultaneous, and they bore the same date, the presumption would be that they were

<sup>1</sup> In *Fisk v. Masterman*, 8 M. & W. 165, an insurance was effected on the 12th of April on a cargo of cotton then at sea, by five separate policies, at the rate of fifty guineas per cent; and on the 13th news of the vessel's safety having arrived, a further insurance was *bona fide* effected by six different policies, at ten and five guineas per cent. The latter insurance added to the former exceeded in amount the value of the subject-matter insured, but the former of itself did not. Held that the assured were entitled to a return of premium on the amount of the over-

insurance, to which the underwriters who subscribed the policies of the 13th of April were to contribute ratably, in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies); but that no return of premium was to be made in respect to the policies effected on the 12th.

<sup>2</sup> *Potter v. Marine Ins. Co.*, 2 Mason, 475; n. 1, p. 287, *supra*; *Wiggins v. Suffolk Ins. Co.*, 18 Pick. 145.

<sup>3</sup> See cases in preceding notes

simultaneous. But this presumption would be overcome by proof that one was made before the other.<sup>1</sup>

If, although actually made on the same day and bearing the same date, they were shown to be successive by proof that they were made or signed one before the other, we think further proof would be admitted to show that they were intended to be simultaneous, and that this declaration was omitted only because it was thought that bearing the same date had a similar effect.

<sup>1</sup> *Potter v. Marine Ins. Co.*, 2 Mason 475; *Brown v. Hartford Ins. Co.*, 3 Day, 58; n. 1, p. 287, *supra*.

## CHAPTER IX.

## OF REINSURANCE.

As every insurer takes upon himself the risks against which he insures, he has in himself an insurable interest against those risks. He may, therefore, indemnify himself against loss by effecting insurance against them. This is called reinsurance, and is quite common. An insurance company that wishes to close up its business may have many outstanding risks, and some of them may be for voyages or periods which will not terminate for a long time. If it would avoid the delay and uncertainty which would arise if it waited for the termination of those risks, it does this by effecting insurance for the whole amount, and then whatever it has to pay, that it will have to receive.<sup>1</sup>

<sup>1</sup> *Merry v. Prince*, 2 Mass. 176. Two policies had been effected on two ships, and were by their stipulations policies of reinsurance. Losses having taken place, it was made a question of law whether or not the statute of 19 Geo. 2, c. 37, § 4, was in binding force in this country. Mr. Justice *Sedgwick* delivered the opinion of the court in substance as follows: "That a contract of reinsurance is not prohibited by the principles of the common law is admitted by the parties. It is a contract which, in itself, seems perfectly fair and reasonable, and might be productive of very beneficial consequences to those concerned in this important branch of commerce; but because it was much abused, and turned to pernicious purposes, it was prohibited by an act of the Parliament of Great Britain, by which reassurances were rendered illegal in all cases, except where the original assurer should become insolvent, a bankrupt, or die. And the only question is,

whether that statute, as such, is law within this Commonwealth. As an act of the British Parliament merely, it is not pretended that its binding force was extended to the Colonies. But it is said, and, in my opinion, it is true, that from the very nature of our relation as colonies to Great Britain, the parent state, at the time the act was passed, it was competent to the Parliament to have extended this provision to the Colonies, if it had seen fit to do so. But if that was the intention it ought to appear by express words, or at least by inevitable implication. 1 Black. Com. 107, 108. But should we even go much further than does Blackstone, and admit that, although the Colonies are not expressly named, yet, if from the whole purview of the statute, it manifestly appears to have been the intention of the legislature that reassurance should be prohibited in the Colonies, that such ought to be the construction, yet I think that the case would be with the defendant, because

So, too, an insurer may wish to lessen his responsibility, and then he effects reinsurance for a part of the amount.<sup>1</sup> Or the risk may be greatly increased by lapse of time or change of circumstances, and he may wish to save himself from a part of his risk by reinsurance, although he pays a much higher premium than he receives. Or he may wish to divide the risks themselves, as, if he insures against all the perils of the sea, he may be reinsured against war risks, or piracy, or against any other risks, from which he may wish to be free.

I can discover no such intention. There are no words in the section prohibiting contracts of reinsurance, or in any other part of the act, which manifest or even imply such an intention. By the most attentive consideration of the statute, I can nowhere perceive such an intention, but, on the contrary, I think it is evident that no such intention existed. Nor can it hardly be believed that the Parliament could have intended that part only of that act should, by indefinite expression, be construed to extend to the Colonies. If such had been the will of the legislature, it would have been declared, and not left a subject of uncertain or difficult construction. There is another foundation, on which, it is said, a defence against this action may be bottomed. The Constitution, ch. 6, art. 6, declare that "all laws which have heretofore been adopted, used, and approved in the Colony, and usually practised on in the courts of law, shall remain in force until altered or repealed by the legislature." It is true that many acts of the British Parliament have been adopted here, from causes which are now unknown. And it is said that wager policies, which are only rendered illegal by the same act, are here considered as invalid, and that this could result only from an adoption here, in practice, of that act. In answer to this argument I observe, that, admitting

wager policies are here illegal, I do not

think the argument would be conclusive, for it is true, that, at the time of the settlement of this country, and for some time afterwards, wager policies were, in England, considered and held to be illegal at common law. *Union Mutual Ins. Co. v. Comm. Mut. Mar. Ins. Co.*, 2 Curtis, C. C. 524, 19 How. 318; *Hastie v. DePeyster*, 3 Caines, 190; *Woodruff v. Columbian Ins. Co.*, 5 La. Ann. 697; *Reed v. Cole*, 3 Burr. 1512; *Oliver v. Greene*, 3 Mass. 133. See also *Mercantile Mut. Ins. Co. v. State Mut. F. & M. Ins. Co. of Penn.*, 23 Barb. 319. "Reinsurance is a valid contract at the common law." See *Bronson, J. New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. 359, 362. In a policy of reinsurance there is no doubt assurance, unless the reassured himself has effected the reinsurance. *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235.

<sup>1</sup> *Union Mut. Mar. Ins. Co. v. Commercial Mut. Mar. Ins. Co.*, 2 Curtis, C. C. 524, 19 How. 318; *Mercantile Mut. Ins. Co. v. State Mut. F. & M. Ins. Co. of Penn.*, 25 Barb. 319; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Penn. St. 250, in which it was held "that underwriters on a time policy may reinsure on a particular voyage, but the time and risks covered must not exceed those covered by the original policy."

In all cases of reinsurance, whatever may be their ground, the reinsured stands, as to his insurers, in the same relation in which the original insured stands to him. The reinsurers may make the same defences against him which he could make against the original insured.<sup>1</sup>

They may have defences against him which he could not have against the original insured. If, for example, the original insured was perfectly honest in obtaining his insurance, and his insurers obtained reinsurance by fraud, concealment, or misrepresentation, this would be a good defence against them; and if an insurer, when applying for reinsurance, withholds such knowledge as he possesses in reference to the character of the party insured, or any circumstances of the case, and this information would be material to the risk or to the amount of premium to be charged, the concealment would avoid the policy of reinsurance. This has been held in the case of fire insurance,<sup>2</sup> and we have no doubt that the

<sup>1</sup> *New York State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story, 458. The plaintiffs in this action had insured the brig *Evelina* for a certain voyage, and afterwards reinsured in the defendant corporation. During the voyage insured, the vessel sustained damage by perils insured against, and the owners claimed of the insurers, the present plaintiffs, a total loss, which they refused to pay; and, action being brought, it was decided that there was liability for a partial loss only. The plaintiffs then claimed of their reinsurers the amount they were obliged to the owners by reason of the judgment recovered, and also the expenses of costs and counsel fees incurred by them in defending the suit. The question for the court was, whether the defendants were liable for these expenses. Mr. Justice *Story* held: "This is a case of reinsurance; and nothing is clearer, upon principle and authority, than that in such a case the reassurers are entitled to make the same defence, and to take the same objections, which might be asserted by the

original insurers in a suit upon the first policy. The consequence would seem to be, that, as no voluntary payment by the original insurers would be binding or obligatory upon the reassurers, they are compellable to resist the payment, and to require the proper proofs of loss from the assured in a regular suit against them, so as to protect themselves by a *bona fide* judgment to the amount of the recovery against them under their reinsurance."

<sup>2</sup> *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359. In this case, which was on error from the Court of Common Pleas, it appeared that the New York Fire Insurance Company, having insured for one year a stock of goods belonging to one Mortimer, effected reinsurance with the plaintiffs, that the goods insured were destroyed, and that the loss was paid by the New York Company, who claimed to recover on their policy of reinsurance. The claim was allowed, and judgment ordered in the Court of Common Pleas, and on error brought

same principle would be held applicable to a case of marine insurance. On the other hand, if the original insured obtained his insurance fraudulently, and his insurers obtained their reinsurance honestly, the reinsurers may defend against the reinsured on the ground that he had a good defence on the original insured, and consequently was at no risk, and had no insurable interest. In such case, the reinsurer would defend against the claim of the original insured, or might leave it to the reinsurers to defend in their name. If the reinsured defended against the claim of the original insured, on reasonable grounds, and were unsuccessful, the reinsurers would pay to them not only what they had to pay on their policy, but the costs and expenses of the defence, unless the reinsurers had withheld their sanction either expressly or by implication.

The reinsured is not bound to pay his insured, and found his claim on this actual payment before he can call upon the reinsurer.<sup>1</sup> For if the reinsured be insolvent, and pay but a small dividend on their policy, they have still a claim on the reinsurers for the whole amount for which they are reinsured, — this amount being measured by the risks which the reinsurers assume for the premium paid them.

to the Supreme Court. One of the grounds of the plaintiffs was, that the defendants, before entering into the policy with Mortimer, had received information concerning him, in effect that he had had trouble with other insurance companies, and that he could not effect insurance with some companies in the city on any terms; which information was not communicated to the plaintiffs when reinsurance was effected. It was held, in substance, that "an underwriter, obtaining a policy of reinsurance, is bound to communicate such information as he possesses in reference to the character of the party insured; and if he omit to do so, whether from misapprehension of the probable effect of such communication when made, or from design, and the information be material to the risk or the amount of

premium to be charged, the policy of reinsurance will be void."

<sup>1</sup> New York State Mar. Ins. Co. v. Protection Ins. Co., 1 Story 458, n. 1, p. 299, *supra*. See also *Hastie v. DePeyster*, 3 Caines, 190, in which it was held that "the reassurer is liable to the assurer for all costs, *bona fide* expenses, &c., incurred in defending the suit, by the original underwriters, especially when, with notice of it going on, he stands by and does not offer to settle; for as the reassurer is entitled to every defence against the insurer which he may urge against the primitive assured, it becomes necessary for the original underwriter to show he has been obliged to pay, on a just claim against him; and he will be entitled to interest on all he has expended and paid."



The original insured cannot assert any interest in a policy of reinsurance.<sup>1</sup>

The reinsurer may include in the amount of reinsurance the premium which he pays for such reinsurance; for then if he pays on the policy he made, and recovers on the policy of reinsurance, he is not more than indemnified. But if he includes also the premium paid him for the original insurance, he would then be more than indemnified by that amount. A question has been raised whether, for this reason, this premium should not be deducted. It has not, as we are aware of, passed under direct adjudication, and, so far as we have been informed, the practice has not been uniform on the subject. Text-writers differ about it. Valin,<sup>2</sup> Pothier,<sup>3</sup> and Boulay-Paty<sup>4</sup> think the deduction should be made, and Mr. Phillips<sup>5</sup> agrees with them. Emerigon<sup>6</sup> thinks the original premium should not be deducted. We are inclined to think that because the original premium is in no way at risk, and reinsurance is founded, not on property, but on risk, this premium does not enter into reinsurable interest.

Reinsurance is prohibited in England,<sup>7</sup> except in case the insurer, being solvent when the policy is made, becomes bankrupt or dies. Mr. Arnould states that this statute arose from the fact that reinsurance had "come to be employed as a mode of speculating in the rise and fall of premiums, and the legislature foresaw that it might be used as a cover for wager policies."<sup>8</sup> Whatever be its cause, the statute is general in its terms, and contains no words to confine it to British ships, and it has therefore been held in England that every reinsurance made in that country,

<sup>1</sup> In *Heckenrath v. The American Mut. Ins. Co.*, 3 Barb. Ch. N. Y. 63, it was held that where a corporation has underwritten a policy, and afterwards causes itself to be reinsured, and after the loss of the property insured such corporation becomes insolvent, the person originally insured has no equitable lien or preferable claim upon the sum of money due on the contract of reinsurance, but that fund belongs to all the creditors of the insolvent corporation, ratably, under the provisions of the Revised Statutes relative to

proceedings in equity against corporations.

<sup>2</sup> Valin, *Comment. sur l'Ordon. tit. 6, art. 20*, tom. 2, p. 279 (ed. de Becana, 1828).

<sup>3</sup> Pothier, *Traité d'Assurances*, No. 36.

<sup>4</sup> Boulay-Paty, *Com. de Droit, Comm. Mar. tit. x. § 10*, vol. 3, p. 429, *et seq.*

<sup>5</sup> Phillips on Ins. § 1248.

<sup>6</sup> Emerigon, *d'Assurances*, ch. 3, § 14, art. 4, vol. 1, pp. 253 – 256 (ed. 1827).

<sup>7</sup> St. 19 Geo. 2, ch. 37, § 4.

<sup>8</sup> 1 Arnould on Ins. p. 291, § 118.

either by British subjects or foreigners, and whether on British or foreign ships, is void unless it comes within the exceptions of the statute.<sup>1</sup>

Insurances are sometimes effected, not under the name or in the form of reinsurance, but under the same principles ; as if a carrier insures against the risks he incurs,<sup>2</sup> or the owners of a vessel, who were answerable for losses caused by the faults of persons employed by them, caused themselves to be insured against those risks.<sup>3</sup> And an owner who sold his vessel, stipulating that he will

<sup>1</sup> *Andree v. Fletcher*, 2 T. R. 161, is an emphatic declaration of the meaning and force of the St. 19 Geo. 2, ch. 37, § 4. As to the expediency of this statute, see *Magens on Ins.* vol. 1, p. 95, and *Bencké*, tom. 1, p. 284.

<sup>2</sup> In *Crowley v. Cohen*, 3 B. & Ad. 478, which was a case of insurance effected on goods on board of thirty boats, for twelve months, between London, Birmingham, &c., the amount of the policy was \$ 12,000; the insured were warranted "free from damage or loss that may arise from wet, occasioned by rain, snow, or hail, or from any loss arising from plunderage, barratry, or pilferage," it was held that an insurance "on goods" was sufficient to cover the interest of the carriers in the goods under their charge.

<sup>3</sup> *Walker v. Maitland*, 5 B. & Ald. 171. The plaintiff in this action had chartered his ship to one Wildman to proceed to the West Indies for a cargo. By custom, the owner of the ship was liable for any loss occurring while cargo was brought from the shore to the ship. To indemnify himself, the plaintiff effected insurance "on boats belonging to the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the said ship during her stay at St. Kitt's." The defendant subscribed this policy for two hundred pounds. During the loading of the ship several losses occurred, on ac-

count of, and caused by, the negligence and incompetency of the crew ; and this action was brought to recover for the losses sustained. *Abbott, C. J.*, was of opinion that the plaintiff was entitled to recover. "The subject of the insurance was very special. No doubt the owner under this policy expected to be indemnified for the loss in question. The words in the policy are very large, and, though it may appear extraordinary that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear that they do so in cases of barratry. In this case the immediate cause of the loss was the violence of the wind and waves. No decision can be cited where, in such a case, the underwriters have been held to be excused, in consequence of the loss having been remotely occasioned by the negligence of the crew. I cannot distinguish this case from that of *Busk v. The Royal Exch. Assurance Co.*, 2 B. & A. 75 ; there, the immediate cause of the loss was fire, produced by the negligence of one of the crew ; yet the underwriters were held to be liable. Here, the wind and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable."

bear certain risks, may insure against them.<sup>1</sup> And it may be said in general, that, wherever the insurance is not on the property of the insured, but against risks which he bears, this is in the nature of reinsurance.

<sup>1</sup> In *Reid v. Cole*, 3 Burr. 1512, the if she was lost within three months. owner of a ship had sold her under The court held that he had an insurable agreement to pay the purchaser £ 500 interest to that amount.

## CHAPTER X.

## POLICIES ON TIME.

A VERY frequent form of policy insures the ship or the cargo during a period of time, with no reference to the voyages which the ship may make, with or without the cargo, or the places she may be in within that period.<sup>1</sup> This is sometimes expressed by the phrase, "wherever she may be," but it would be a conclusion of law from the fact that it was a time policy, unless there were certain provisions respecting the voyage or place, in which case it would be rather a mixed policy than a time policy. The term specified in the policy, whether it be for the beginning or for the end, is the time at the place where the contract is made, and not the time at the place where the ship may happen to be, unless it is otherwise provided in the policy.<sup>2</sup> So, too, such an insurance ends

<sup>1</sup> *Bradlie v. Maryland Ins. Co.*, 12 Peters, 378, in which Mr. Justice Story said: "A policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever undertaken within, and not exceeding in point of duration, the limited period for which the insurance is made. But an insurance on time by no means contains any undertaking on the part of the underwriters that any particular voyage undertaken by the insured within the prescribed period shall be performed before the expiration of the policy. It warrants nothing as to any retardation or prolongation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured, and of resuming it if interrupted. In other words, the undertaking is that the ship shall not, by the operation of any peril insured against

during the time for which the policy continues, be totally and permanently lost or disabled from performing the voyage then in progress, or any other voyage within the scope of the policy." And see also *Coggeshall v. Amer. Ins. Co.*, 3 Wend. 283, where Mr. Chief Justice Savage said: "A policy on time is subject to the rules of construction in other cases, except as to the commencement and termination of the voyage."

<sup>2</sup> In *Walker v. Protection Ins. Co.*, 29 Maine, 317, the action was upon a policy of insurance effected at Portland, upon the bark *Elizabeth*, on the 17th of December, 1845, for one year, commencing and ending at twelve o'clock, noon.: *Wells, J.*, said: "The jury were instructed that the risk would not expire until the expiration of the year, the time being reckoned according as it would be twelve o'clock at noon at Portland on December 17th, 1846. The vessel having been lost on the day when

at the prescribed time, not only without reference to the place of the ship, but with entire disregard of the object or completion of the voyage.<sup>1</sup> And if the loss occurs at any moment within the

the policies expired, and, as the defendants contended, after noon, at the place where she then was, this instruction was material. The contract of insurance was for a year, and if the time of noon should be taken at a place east or west longitude from Portland, on the day when the risk expired, the period of time would be lessened or extended, and might be less or more than a year. Such a construction would be in violation of the contract. The parties must be considered as regarding the meridian of the place where the contract is made, unless some other one is mentioned in it."

<sup>1</sup> *Grousset v. The Sea Ins. Co.*, 24 Wend. 209; action on a marine policy of insurance effected in New York on the schooner *Hero*, &c. "At and from New Orleans, Campeachy, and Havana, for the period of six calendar months from the 12th September, 1835, beginning the adventure upon the said vessel, tackle, apparel, &c., at as aforesaid, and so shall continue and endure until the vessel shall be safely arrived at as aforesaid." The vessel was injured in a gale while proceeding from Havana to New York, and put into Charleston, S. C., for repairs. The presiding judge instructed the jury that it seemed to him this policy covered only specific voyages between the three ports named in the policy, and that as the voyage on which she was injured was not one of these the defendants could not be held for the average of the expense of repairs. Plaintiffs sued out a writ of error, verdict having been rendered under these instructions for the defendants. Mr. Chief Justice *Nelson*, in giving the opinion of the

court, said: "Usually when the insurance is upon a particular voyage or voyages, there is no reference to time when the risk commences or terminates. When the insurance is for a term of time, the *termini* of the risk are the day and hour specified when the insurance commences and terminates, and the statement of the place of either is not common. The form of the policy used is the common one in cases of insurance for a particular voyage where the *termini* are given. This, together with several other provisions, have no consistent or possible application to the case of an insurance upon time, or where that enters into the description of the risk. In any view that I have been able to take of this case, it seems to me the plaintiff below was entitled to recover, and that, therefore, the judgment should be reversed."

In *Manley v. United F. & M. Ins. Co.*, 9 Mass. 82, the policy was on a vessel for one year, commencing the risk at B., on the 7th December, but in point of fact she had left that place on the 6th, and was some fifty miles distant on the 7th. The loss happened within the year, and the plaintiff recovered; the court holding the risk determined by time, and the place of commencement by fair construction not material.

In *Coggeshall v. Amer. Ins. Co.*, 3 Wend. 283, the policy was effected on goods and merchandise "laden and to be laden" on board a ship, for the term of six calendar months, no reference being made to any particular voyage, and it being stipulated that the risk was to commence from and immediately following the loading of the goods on

period of time, the liability of the insurer is complete, with no reference to the quantity of time which has passed between the beginning of the risk and the loss.<sup>1</sup> Hence the insurance is not suspended by the ship putting into and remaining in a port of distress, nor indeed if she goes anywhere without any necessity or justifying cause, because the law of deviation cannot apply to a policy on time, for the reason that it has no prescribed track.<sup>2</sup>

For a similar reason, a pure time policy gives to the insured liberty to dispose of the goods insured at any place. A further inference is made in an American case, and a rule laid down in very positive terms by the court. This is, that a policy on time simply; with no specification of ports or places, must necessarily imply a trading voyage, and therefore the policy attaches during the whole time, not only to the goods at first on board, but to the

board the vessel. This was held to be a policy on a trading voyage, such being considered to be the intention of the parties, and that as such the insured had all the usual privileges of touching and trading common to such a voyage, and that, however often the goods might be changed, the policy would attach. It was held in *Martin v. Fishing Ins. Co.*, 20 Pick. 389, in which a vessel was insured "at and from C., on the 16th day of July at noon, to, at, and from all ports and places to which she may proceed in the coasting business for six months," that the policy attached, although there was no evidence that the vessel was at or prosecuting her voyage from C., on the day named, it appearing that when the policy was made, neither party knew when the vessel sailed from C., and that it was their intent to insure on time, without regard to the place where the vessel might be.

<sup>1</sup> *Tyrie v. Fletcher*, 2 Cowper, 666. In *Loraine v. Tomlinson*, 2 Dougl. 585, Lord Mansfield said: "This is a mere case of construction, on the face of the instrument. It is an insurance for twelve months, for one gross sum of

£ 18. They have calculated this sum at the rate of fifteen shillings per month. But what was to be paid down? not fifteen shillings for the first month, and so from month to month, but £ 18 at once. *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases: 1. If the risk has never begun, the whole premium is to be returned, because there was no consideration; 2. When the risk has begun, there never shall be a return, although the ship should be taken in twenty-four hours."

<sup>2</sup> It was said by Mr. Justice Cowen, in *Union Ins. Co. v. Tysen*, 3 Hill, 118, that "it is of the nature of a time policy that it limits the vessel to no geographical track. It is impossible, therefore, to make out a defence on the ground of a *deviation*, in the ordinary sense of the word. Nor can any particular trip or voyage be regarded as having the effect of a deviation, unless it be undertaken in fraud of the policy. And in *Keeler v. Firemen's Ins. Co.*, 3 Hill, 250, Mr. Justice Cowen said: "It is difficult to perceive how deviation can be predicated in a time policy."

goods substituted, if the original goods are sold anywhere, and other goods purchased by their proceeds.<sup>1</sup> How it would be if the original goods were sold in one port, and the vessel, proceeding to another, there took in a new cargo procured by funds of the owner, which were distinct from, and independent of, the proceeds of the original cargo, is not clear from authority. We should think the policy would not attach to this new and independent cargo, unless some provision were made for it in the policy. And we believe the practice to be when the policy is a time policy on ship and cargo, and it is intended to cover any other cargo than the original cargo, to express this intention in the policy. There is no doubt that a time policy may be as retrospective as a voyage policy, if it contain the clause "lost or not lost," and this equally in reference to the cargo as to the ship.<sup>2</sup> Time policies usually and perhaps always in this coun-

<sup>1</sup> *Coggeshall v. Amer. Ins. Co.*, 3 Wend. 289, *supra*, n. 1, p. 305, in which the court say: "A policy on time simply, where no ports are mentioned, must, as already remarked, necessarily imply a trading voyage, which again implies liberty to dispose of the goods insured. It seems to us, therefore, no doubt can be entertained that the policy attached to the proceeds of the goods insured."

<sup>2</sup> *Paddock v. Franklin Ins. Co.*, 11 Pick. 227. The ship *Tarquin* sailed from Nantucket in January, 1822, on a whaling voyage, and insurance to the amount of \$600 was effected on her cargo nearly three years after. The policy contained the clause, "beginning the adventure upon the said cargo as aforesaid, and to continue during the voyage aforesaid, on the vessel until she be arrived, &c., and on the property until landed." On her homeward voyage the ship foundered, and the whole property was lost. Plaintiff as owner claimed for a total loss. The first ground of defence was, that the policy attached at the time of its date, at which time the ship was not seaworthy. On this point Mr. Chief Justice

*Shaw* said: "The policy is on cargo on board ship *Tarquin*, now on a whaling voyage. No *termini* of the voyage are expressed, except the return to Nantucket. But the voyage means the whole voyage, from the commencement, and if not expressed it is implied, and may be shown by proof of the fact, when the voyage did actually commence, by the sailing of the ship. The word 'now' we take to be merely descriptive, and designed to identify the voyage. With these views, therefore, we are of opinion that this policy would attach upon the oil from the time the ship first began to take whales upon this voyage. Supposing there was no misrepresentation and concealment affecting the case, we see not why this policy would not cover any loss that might have happened at any time anterior to the date of the policy, and after any oil was taken in." See also *Hucks v. Thornton*, Holt's N. P. Rep. 30. And in *Coggeshall v. Amer. Ins. Co.*, 3 Wend. 283, *Savage*, C. J., said that "parties may contract, and have done so, so as to incur risks antecedent to the date of the contract."



try state, not only the days when they begin and end, but the hour ; and then, of course, the time begins at the beginning of one hour and ends also at the beginning of an hour. As if it be from twelve o'clock on one day to twelve o'clock on another day, then the policy begins as soon as it is twelve on the first day and ends as soon as it is twelve on the other day. The purpose of such a policy is obviously to insure the ship during one whole year and no more, and on this ground it has been held, that as the time of the place where the contract is made must determine the beginning, so it must determine the end ;<sup>1</sup> for otherwise if the vessel, when the time expired, were at the antipodes of the first place, she would be insured for a year and half a day. If, however, a time policy began on a certain day, it would undoubtedly begin at the beginning of that day, and cover the whole of it. If, however, it began from a certain day, we have no authorities arising under policies of marine insurance to determine the construction, and cases under life policies and other contracts are, as Lord Mansfield said, "so many contradictions backwards and forwards."<sup>2</sup> The practice of this country, in marine insurance, so uniformly designates both the day and the hour, that the question is not likely to arise. If it did, however, we should suppose that from the day, and on the day, would be held to be equivalent. From and after, might exclude the day.

Another question has arisen which is not without its difficulty. If a ship, within the period, is injured by a peril insured against, but survives until after the period expires, and then perishes, are the insurers liable? Undoubtedly the general, or rather the universal, rule under time policies must be that the insurers are liable for a loss happening at any moment within the limited period, and not liable for any loss which happens after the period has terminated. In the first case in which this question arose, Lord Mansfield applied this rule literally, and held the insurers discharged because the vessel had been kept to float a few days after the time expired, although she had received her death-wound within the time.<sup>3</sup> We know this

<sup>1</sup> *Walker v. Protection Ins. Co.*, 29 Maine, 317.

<sup>2</sup> *Pugh v. Duke of Leeds*, 2 Cowper, 714. It was held by Lord *Holt* in *Sir Robert Howard's case*, 2 Salk. 625, that

"'from the day of the date' excludes the day, but 'from the date' includes it."

<sup>3</sup> *Meretony v. Dunlope*, cited by Mr. Justice *Willes*, in giving judgment in *Lockyer v. Offley*, 1 T. R. 260.

case only by the citation of it by the court in another case. So far as we are aware, however, it must be regarded as the law of England. Mr. Arnould, however, appears to doubt it,<sup>1</sup> and remarks that the correctness of this decision has been questioned by Mr. Benecké, and its authority expressly dissented from in the United States.<sup>2</sup> It must be certain that the insurers in such a case should be answerable for all the damage actually sustained by the ship, within the period for which it is insured.<sup>3</sup> And if this damage causes her

<sup>1</sup> 1 Arnould on Ins. (Perkins's ed.), 411; Benecké, *System des Assecuranz*, vol. 2, § 3, ch. 8 (ed. 1807).

<sup>2</sup> *Peters v. Phoenix Ins. Co.*, 3 Serg. & Rawle. 25. The action was on a policy of insurance on the brig *Madeira*, at and from Philadelphia to Charleston, and at and from thence to Madeira. Going out of Charleston Harbor she struck on the bar, and was considerably damaged. As a result of this injury, and further damages from heavy seas and head winds, she was condemned and sold in Funchal Roads. The judge on the trial told the jury, that if they found that the brig was deteriorated in value fifty per cent by the striking on Charleston Bar, to find for the plaintiff for the whole amount claimed, which was a total loss. The jury did find for the plaintiff, and defendant excepted. Mr. Chief Justice *Tilghman*, in delivering the opinion of the court, said: "On the second point, the counsel for the defendants seem to have fallen into an error, from not attending to the distinction between an actual total loss and that kind of loss which is total, not in fact, but in contemplation of law, i. e. when damage has been suffered during the voyage to the amount of fifty per cent. Two cases were cited. In *Lockyer v. Offley*, 1 T. R. 252, after the ship had been moored twenty-four hours, she was seized for an act of smuggling, committed by the captain during the voyage, and

which would amount to barratry. It was held that the underwriters were not liable. The reason is plain; there was no loss till seizure, and whether a seizure would ever be made was uncertain, until it actually was made. At the time that the policy expired, therefore (twenty-four hours after the mooring of the ship), the assured had lost nothing; which is altogether different from the present case, where the damage had been sustained before the mooring of the ship. In the other case, *Meretony v. Dunlope*, cited by Justice *Willes*, in *Lockyer v. Offley*, the ship received her death-wound during the voyage, but was kept afloat by pumping till after the policy was expired; and it was held that the underwriters were not liable. We have no report of this case which informs us of the nature of the policy. It was probably of that kind which precluded the assured from recovering for a partial loss; otherwise this decision would be contrary to other cases of unquestionable authority, and could not be law. Exceptions overruled."

<sup>3</sup> *Howell v. Protection Ins. Co.*, 7 Ohio, 384, in which it was held that if a vessel insured receive an injury that occasions her total loss, before the expiration of the policy, but is not lost within its existence, the insurers are liable only for the actual injury within the time of the policy.

entire destruction within a short time, it might be argued that the damage thus ascertained by the result amounted to a total loss.<sup>1</sup>

In two cases before the Superior Court of the city of New York, it appeared that the insured had sold and transferred his interest in the ship before she sunk, and this part was relied upon by the insured in their defence. But it was also shown that, before the transfer, she had received an injury from perils insured against, which rendered it impossible to keep her afloat, and made her destruction inevitable, and for this reason it was held that the insurers were liable. The transfer was made in ignorance of the injury the vessel had received.<sup>2</sup>

It would be more difficult to reach this conclusion in reference to the cargo, supposing that to be wholly uninjured by the accident, and to remain unharmed until it sank with the vessel after the time had expired. To hold the insurers liable in this case for the cargo as well as the ship, it would be necessary to hold that if the loss of the property insured, ship or cargo, is caused by a peril insured against, within the limited time, and this cause does not

<sup>1</sup> *Hoit v. Smith*, 3 Johns. Cases, 15. This was an action on a policy of insurance on horses from Liverpool to New York "against all risks, including the risk of death from any cause whatever, until the goods shall be safely landed." Three days before arriving at New York a heavy gale came on, the ship rolled a great deal, and one of the horses was thrown off his legs, and somewhat injured. Before the gale the animal was in good health, but afterwards refused to eat, and so continued till three days after landing in New York, when he died. Examination after death showed that his death was caused by bruises received during the gale. Mr. Justice *Kent* said: "I fully agree with the doctrine laid down in *Lockyer v. Offley*, that the insurer is not liable for losses happening after the term prescribed in the policy, although the subsequent loss be in consequence of a peril in the policy. What was the con-

dition of the cargo when it was landed, is the only question. In this case one of the horses received a death-wound during the voyage, and by reason of the perils insured against in the policy. The damages so received, as they existed at the termination of the voyage, are a proper subject of retribution. If the plaintiffs would have a right of action for an injury to the horse, by which his value was lessened, had the horse survived, they surely must have that right of action, notwithstanding the subsequent increase of loss. I am of opinion they are entitled to recover, and for the full amount of the horse, for he was so disabled by the fall, as that he could not eat before he landed, and died three or four days after. It was a total loss of the horse." Judgment was accordingly rendered for the plaintiff.

<sup>2</sup> *Crosby v. N. Y. Mut. Ins. Co.*, 5 Bosw. 369; *Duncan v. Great Western Ins. Co.*, id. 378.

complete its effect until after the time has elapsed, this would still be a loss within the policy. This would seem to be the tendency at least of the American authorities.<sup>1</sup> It is, however, obvious that the peculiar circumstances of each case would affect importantly the application of this rule. If, for example, a ship is knocked on her beam-ends by a storm the day before the term expires, and her seams are opened so that she leaks very badly, and the utmost exertions of the crew can keep her afloat only three days, and she then sinks, this case might differ in its result from one where a vessel similarly injured in mid-ocean, but not so badly, continued to float and to sail for a considerable time, and finally sank. Perhaps the question would be left as a question of fact for the jury, whether she had within the term been so much injured as to render her destruction inevitable, for we should not suppose that anything less than this would hold the insurers liable as for a total loss. It has already been held, and may be considered as settled, that if a ship, insured on a time policy, is never heard of, it is a question for the jury, upon all the evidence in the case, whether she was lost within the time or after its expiration.<sup>2</sup>

Policies may be on time, but the time itself determined by ports or

<sup>1</sup> 3 Kent's Com. p. 308. The cases there cited are fully stated in the three preceding notes.

<sup>2</sup> *Brown v. Neilson*, 1 Caines, 525. In this case, which was an action on a time policy for four months, the judge charged the jury "that there was not any time fixed by law after which a missing vessel shall be presumed to be lost; that if the jury thought the vessel was probably lost within the time limited by the policy, they ought, in his opinion, to find for the plaintiff; that he thought the rule ought to be, if a vessel did not arrive within the usual limits of the voyage she was prosecuting, she ought to be presumed to be lost; and that it would not be reasonable to calculate on the utmost or greatest limit of it; that they ought to decide according to their judgment of the greater probability of her not being lost in the first storm or

in the last." This ruling, being excepted to, was confirmed in the Supreme Court. The time at which a presumption of loss, from a vessel's not being heard of, shall arise, is not precisely established. Each case must depend on the nature of the voyage and the distance of the *termini*. *Gordon v. Browne*, 2 Johns. 150. It is not necessary, for the establishing of such an inferential claim, to show, by witnesses, that the vessel did not arrive at her port of destination. It is sufficient to prove that she has not been heard of in the country from whence she sailed and where insured. *Tremlow v. Oswin*, 2 Campb. 6, 85; *Green v. Brown*, 2 Stra. 1190; *Newby v. Read*, cited *Park on Ins.* 148. But it must be made to appear that when she left the port of outfit she sailed on the voyage insured. *Cohen v. Hinckley*, 2 Campb. 51.

voyages indicated. Or they may be on time, but the voyages to be undertaken during the time expressly stipulated.<sup>1</sup> It is obvious that every policy of this kind must be construed according to its peculiar stipulations. The cases which turn on the construction of these mixed policies are hardly reconcilable. On principle, we should say that, if the time was to begin with a certain voyage, then of course the policy would not attach until the voyage began. If the policy was from a certain day, and then went on to say, from a certain port to certain other ports, the policy would not begin until that day at any rate, and not after that day, until the prescribed voyage began. And if on that day she had already sailed on the voyage prescribed, it would attach on that day, but not if she had sailed on any other voyage.<sup>2</sup> And the insurers have been discharged when, on that day, she was sailing on a different voyage, and afterwards sailed on the track indicated by the policy, and was lost while so sailing within the term.<sup>3</sup> But the decision in this case can be supported only on the ground that in such a policy there are in fact two *termini* for the beginning, one of which is the time and the other is the specific voyage. Suppose the policy to be from the 1st day of January, 1867, to the 1st day of January, 1868, from New York to a port or ports in China, and thence to New York, and on the 1st of January, 1867, the vessel was in New York, and on the 1st of February sailed for

<sup>1</sup> In *Way v. Modigliani*, 2 T. R. 30, the terms of the policy were "on the ship Polly, at and from any ports in Newfoundland to Falmouth, or her ports of discharge in England, with liberty to touch at Ireland, and any ports in the Channel"; policy to take effect from the 20th of October. On the 1st of October the ship left Newfoundland, went to the Banks, and fished till the 27th, and sailed from thence to England. The vessel was lost in November. *Buller, J.*, said: "Where a policy is made in such terms as the present to insure a vessel from one port to another, it certainly is not necessary that she should be in port at the time when it attaches, but then she must have sailed on the voyage insured, and not on any other.

Now, what is the case here? The voyage insured is from a port in Newfoundland to England, whereas this vessel sailed to the Banks, which was a different voyage. This point has been already decided in the case of *Wooldridge v. Boydell*, H. Bl. Rep. C. B. 231, where it was held that if a ship, insured for one voyage, sail upon another, and she be taken, though in the same track part of the way, yet taken before the dividing point of the two voyages, the policy is discharged." Judgment for defendant. See also *Robertson v. French*, 4 East, 130.

<sup>2</sup> *Way v. Modigliani*, 2 T. R. 30, *supra*.

<sup>3</sup> *Wooldridge v. Boydell*, H. Bl. Rep. C. B. 231, *supra*.

China, we should say the policy attached on the 1st of February. But if on the 1st of January she was sailing from New York to New Orleans, and on the 1st of February was sailing for China, and had reached the same track which she would have pursued had she sailed direct for China, still the policy would not attach, because she had not sailed from New York to China, and this was one of the conditions of the policy. It seems to be quite well settled in this country that, where time is mentioned, and also place, or voyage, if within the term the vessel is at the prescribed place, or begins the prescribed voyage, although not at the beginning of the time, the policy will attach. And in one case<sup>1</sup> the court held it to

<sup>1</sup> *Martin v. Fishing Ins. Co.*, 20 Pick. 389. This was an action of assumpsit upon a policy of insurance, dated July 23, 1835, by which the defendants caused the plaintiff, for whom it concerned, to be assured, lost or not lost, in the sum of \$ 2,000, payable to him, "on the brig Helen, at and from Calais, Maine, on the 16th day of July, at noon, to, at, and from all ports and places to which she may proceed in the coasting business for six months ending the 16th day of January, 1836, at noon (prohibiting all ports in North Carolina except Wilmington), the company not to be liable for any damage to or from her sheathing, nor for any partial loss under ten per cent." The vessel was valued at \$ 2,000, including the premium. The vessel was totally lost by perils of the seas December 15, 1835. One of the defence was, that there being no evidence showing that the vessel was at or prosecuting a voyage from Calais on the 16th of July, according to the terms of the policy and the averment in the declaration, although it appeared that she was at Calais after the policy was effected and before the loss, it was objected by the defendants, that the plaintiff had not made out a case in this particular. This objection was overruled by the court, who instructed the

jury that it was not incumbent on the plaintiff to prove this point. The full court, in an opinion by *Putnam, J.*, said as to this: "We think the decision in *Manly v. United Mar. & Fire Ins. Co.*, 9 Mass. 85, a good answer to this objection. There an insurance was made upon a vessel for one year, commencing the risk at B. on a day certain, at noon; in fact, however, the vessel had left the port of B. the preceding day, but was in good safety at sea on the day fixed, and was afterwards lost within the year, and the underwriters were held liable. *Sewall, J.*, who was a very able commercial lawyer, gave the opinion of the court, and very properly observed, that the policy was made, not with any distinct view as to place, but merely regarding time. That case affords an illustration of the doctrine of warranty. If the intent of the parties was that the policy was to attach on condition that the vessel was at B. on the day named, and that the risk should begin there, excluding every other place, then the policy never attached. But the court held that the intent was to commence the risk on a day certain, and that the intent to insure at B. was not exclusive of any other place. It is a material fact in that case, and which is similar to the case at



attach from the beginning of the time, although the ship was not till subsequently at the place from which the insurance was to begin. But the peculiar language and purpose of this policy affected the decision. In another case<sup>1</sup> the court went still further, and held that the policy attached, although there was a place distinctly mentioned as that at which the risk should commence, and the vessel was never within the time at that place.

It is obvious that in all mixed policies of this kind, where there are two elements or conditions mentioned for the beginning of the risk, the words used in the policy, and the obvious purpose of the insurance, must have great effect in determining which of these two elements predominated over the other, even to the suspension of the other, so as to make it merely a voyage policy or merely a time policy, or whether both were to be regarded as essential, so that the risk did not begin until both conditions were complied with; that is to say, until within the time the prescribed voyage began. The American cases to which we have already referred on this subject seem to tend strongly to construing such a mixed policy as a mere time policy. But this may be carried too far. Suppose a policy insured a ship during one year from a certain day to a certain other day, expressly providing that the ship was to be insured during that time only while sailing from one certain port to another, we know no reason whatever why full force and effect should not be given to such a provision. And whatever words were used, if when rationally construed they mean the same thing, they should have the same force. But if certain ports and voyages are mentioned only for the purpose of describing the kind or course of navigation, and not for indicating the beginning of the risk, then they should have only the intended effect. It has been held,<sup>2</sup> where there was a policy on time, with an express limitation

bar, that, when the policy was made, neither party knew when the vessel sailed from the port named; and it was the clear intent of the parties to insure on time, without regard to the place where the vessel then might be, but with regard to the employment in which the vessel was engaged, viz. the coasting trade. This objection, we think, cannot prevail."

<sup>1</sup> *Manly v. United Ins. Co.*, 9 Mass. 85; see *supra*.

<sup>2</sup> In *Kent v. Manufacturers' Ins. Co.*, the facts were, that, two days before the expiration of a policy fully insuring a vessel on time, the defendants made a policy insuring the same vessel at and from Boston to Charleston; the second policy providing that if the assured should have made prior insurance upon the



at and from one port to another, and a second policy on time, with the common clause as to prior insurance, and a ship was sailing on the prescribed voyage on the day when the first policy expired, the second policy took effect as soon as the first policy expired. Time policies sometimes begin the risk, if the vessel be "at sea" at a certain time, or if "on a passage" then. More often they provide that if "at sea or on a passage" at the expiration of a certain time, the insurance shall continue until she arrives at her port of destination, or until her arrival in port. And the question may then arise, as to the time when the period of insurance expires. It is perhaps impossible to give a general rule which shall answer this question as it arises in different cases. It has been the subject of frequent adjudication in this country, and we give the cases below.<sup>1</sup>

vessel, then the defendants should be chargeable only for so much as the amount of such prior insurance should be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another. The vessel sailed from Boston before the expiration of the first policy, but was lost after it had expired. It was held that the second policy attached, notwithstanding the first policy continued in full force till after the vessel had sailed from Boston; and that the defendants were consequently liable for the loss.

<sup>1</sup> In *Bowen v. Hope Ins. Co.*, 20 Pick. 275, the vessel was insured for a year, and if "at sea" when the year expired, then the risk was to continue till her arrival in port. Before the expiration of the year, the vessel being at Bangor in Wales, ready for sea, dropped down seven or eight miles below Bangor, with the intention of proceeding on her voyage, but in consequence of head winds came to anchor, and was unable to proceed to sea, though she attempted to do so for several successive days, until after the expiration of the year. She

was held to be *at sea* at the termination of the year, within the meaning of the policy. *Shaw, C. J.*, said: "The term 'at sea' is used in contra-distinction to arrival in port. If the vessel has sailed or commenced a passage, she must be considered to be 'at sea,' within the meaning of this clause. When a vessel quits her mooring in a complete readiness for sea, and it is the intention of the master to proceed on the voyage, and she is afterwards stopped by head winds, and comes to anchor, still intending to proceed as soon as the wind and weather will permit, this is a sailing on the voyage." The expressions "at sea" and "on a passage" were considered to be equivalent to each other. The doctrine of *Bowen v. Hope Ins. Co.*, and *Samé v. Merchants' Ins. Co.*, was held to be sound in *Hutton v. American Ins. Co.*, 7 Hill, 321. The facts in this case were, that in a time policy upon a vessel for one year, from January 21, 1835, it was stipulated that, "if she was at sea at the expiration of the term, the risk should continue at the same rate of premium till her arrival at the port of destination." She sailed from New York,

intending to go to St. Barts and Curaçoa, and then return; but after landing at those ports she went to St. Thomas, for the purpose of taking in cargo. Having encountered severe storms on the way to St. Thomas, she was necessarily detained there for repairs till the 22d of January, 1836, when she commenced taking in cargo, and sailed for New York on the 30th, but was lost on the voyage. She was held not to be at sea when the time specified in the policy expired, but in a port of destination, and the underwriters were discharged. See also *Wood v. New England Mar. Ins. Co.*, 14 Mass. 31, in which insurance was for twelve calendar months, with an agreement that, should the vessel be at sea at the expiration of that period, the risk was to be continued under the policy, at an agreed premium, until her arrival at a port of discharge. At the expiration of the year the vessel was in a British port, where she had been carried against the will of the master. A loss accruing afterwards in the further prosecution of the voyage, it was held that, being absent on a voyage, which had been commenced within the time of the original risk, the policy continued to protect the property after the expiration of the year, although not then literally at sea. *Eyre v. The Mar. Ins. Co.*, 6 Wharton, 240. In this case a vessel was insured "for and during the term of twelve calendar months, ending on the 10th of November, 1838, with liberty

of the globe; and if at sea at the expiration of the said twelve months, the risk to continue at the same rate of premium until her arrival at her port of destination in the United States." "Beginning the adventure upon the said vessel, &c., for twelve months from November 10, 1837, as aforesaid, and so shall continue and endure until the said vessel shall be safely arrived at November 10, 1838, at noon, with liberty of the globe as aforesaid, and until she shall be moored twenty-four hours in safety," &c. The order for insurance was in the words of the first clause above stated. The vessel sailed from Philadelphia in November, 1837, for South America, for the purpose of freighting, and took on board a cargo entirely on freight, and sailed on the 9th of October 1838, for the island of Jersey, in the British Channel, for orders. On the 10th of November, 1838, she was at sea on the voyage to Jersey; and while still at sea, in December, 1838, encountered a gale which did her great damage. The court held that, on the true construction of the contract, the underwriters were not liable after the expiration of the year, unless the vessel should be on her voyage to her port of destination in the United States; and therefore they were not answerable for the loss suffered in the gale of December, 1838. See also *Amer. Ins. Co. v. Hutten*, 24 Wend. 330; *Union Ins. Co. v. Lysen*, 3 Hill, 118; *Burrows v. Turner*, 24 Wend. 276.

## CHAPTER XI.

## RUNNING POLICIES.

**POLICIES** are sometimes called by this name in which an insurance is made on goods to be afterwards specified and declared.<sup>1</sup> They are sometimes also called open policies. We have already seen that policies also bear this last name in which the property insured is specified, but not valued, and, in case of loss, the value of the property is open to proof; open policies being in this sense opposed to valued policies.<sup>2</sup> Running policies are also sometimes called open policies, because they remain open for the addition of subject-matters to which the insurances attach. In England this distinction between open and running policies seems to be better established than here; the name "open policies" being there now used generally in distinction from "valued policies." But what we call "running policies" are there often called "floating policies," and this seems to be the term by which they are now generally known. They are sometimes called "ship or ship's policies."<sup>3</sup>

The phraseology of such policies is different in different cases, and as used by different companies; but, whatever words are used, they always mean that the merchandise to which the insurance shall attach shall be afterwards specified and described in writing, and generally if not always indorsed on the policy.

Sometimes the voyage or voyages, and the ship or ships, are specified in the policy itself, and sometimes the policy is merely on

<sup>1</sup> There can be no doubt that a policy may be made and delivered which as yet covers no property; because it may provide that the property to be insured under it shall be defined and ascertained by statements to be subsequently and at various times indorsed upon the policy. *Jamson v. Ralli*, 6 Ellis & B. 422, 36 Eng. L. & Eq. 198; *Langhorn v. Cologan*, 4 Taunt. 330; *Neville v. Merchants' Insurance Company*, 17 Ohio, 192; New-

*lin v. Insurance Company*, 20 Penn. State, 312.

<sup>2</sup> It was held in *Crawford v. Hunter*, 8 T. R. 15, n., that, in order to make a policy in this form a valued policy, the declaration of the assured of the value of the property must be made before he has intelligence of a loss.

<sup>3</sup> All these terms are applied to them in *Hopkins's Manual of Marine Insurance*, which is the latest English work of any magnitude on that subject.

time, and the ships and voyages, as well as the merchandise, are to be subsequently indorsed.

Policies of this kind are now very common. Merchants engaged in a certain course of trade wish to keep all their merchandise constantly under insurance. They effect this, not by a policy upon every adventure, but by one policy sufficiently general in its terms to cover all the expected shipments; and then as the insured has notice of each, he indorses it on the policy.

Sometimes the policy requires that each indorsement shall be assented to by the insurers before the insurance attaches to it. In other policies the indorsement has, of itself, this effect. By indorsement of the policy is not meant that the insured may make his own indorsement at his own time and pleasure, on the copy of the policy in his hands, and then this indorsement necessarily and by its own force brings the property under insurance, without a communication of it to the insurers. For the indorsement must be made on the copy of the policy in the hands of the insurers, or at all events a communication must be made to them. If, however, the terms of the policy give to the insured the right to specify and indorse certain shipments, and the insured, in due time and manner, specify and declare such a shipment, and request of the insurers the indorsement thereof, and the insurers refuse this without sufficient cause, they would be held as effectually as by an indorsement.

We learn from a case in Burrow's Reports<sup>1</sup> that this form of policy was, if not common, at least not unknown in England more than a century ago. The action was upon a policy whereby an insurance was effected on "any kind of goods and merchandises whatever," in "any of the packet-boats that should sail from Lisbon to Falmouth, or such other port in England as his Majesty should direct his packets appointed between Lisbon and England for one whole year." Nothing is said in the case of any declaration or indorsement to be made. This omission may have arisen either from the circumstance that no question concerning indorsement was in the case, or from the absence of any requirement in the policy of indorsement. This last seems, from the whole case, probable. The case was tried before Lord Mansfield, and then before the whole court. "The court agreed that this was a policy of a peculiar sort."

<sup>1</sup> De Costa v. Firth, 4 Burrows, 1966.

In modern times, many questions have arisen under these policies. Some of them relate to the indorsement. It is common for the insured to make the indorsement on their own copy of the policy, communicate this to the insurers, and ask for their confirmation. If the insured makes an indorsement which he has a right to make, and this is communicated properly to the insurers, and they, without sufficient reason, refuse their acceptance, we have seen that they would, as these policies are generally framed, be held. So, too, if the insured made an indorsement varying from the terms of the policy, and which the insurers had a right to reject, if they accepted it they would be held. But the question has arisen, What is the proof of such acceptance? <sup>1</sup>

If the insurers did any act which indicates a recognition of the indorsement, this may mean that they accept the indorsement, or only that they acknowledge notice of it. In one case the insurers placed their initials to an indorsement inconsistent with the policy. But it was held that this was not sufficient evidence of their assent to the alteration, on the ground that the initials might be construed as intended only to acknowledge the receipt of the notice, and identify it as a declaration of the insured. <sup>2</sup>

Sometimes the policy provides that it shall not be binding until countersigned by the insurers through certain agents. In a case in Massachusetts there was a policy "on property on board vessel or vessels to, at, and from all ports and places, as by indorsements to be made hereon." No policy could be wider in its provisions. It was duly countersigned. Afterwards, the agents who countersigned it agreed with the insured to insure under this same policy, but for an additional premium, a certain quantity of merchandise then on shore. This merchandise was destroyed by fire, and the insurers were held, on proof that the merchandise was to have been shipped, and that there was no unreasonable delay in shipping it. <sup>3</sup>

<sup>1</sup> See the case of *Dounville v. Sun Mut. Ins. Co.*, 12 La. Ann. 259, in note 1, p. 326, *infra*.

<sup>2</sup> *Entwhistle v. Ellis*, 2 H. & N. 549.

<sup>3</sup> *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray, 204. The defendant corporation did business in Boston, through its agents, P. & B. On the 9th

of February, 1865, it duly insured the plaintiffs, to the amount of \$30,000, "on property on board vessels, &c., to, &c., as per indorsements to be made hereon."

On the 21st of the same month, the plaintiffs having purchased 400 bales of cotton, of which 115 were on board ship, and the remainder in store at New Or-

In another case the policy was indorsed, "open, cargo, steamboat, and canal"; the policy declared that the insurance was against "the perils of the seas, rivers, fire, and overpowering

leans, applied to the defendants' agents to effect insurance thereon under this open policy. B., one of the agents, agreed to effect the insurance upon both parcels, on board vessels from New Orleans to Boston, taking also, in reference to the 285 bales not shipped, the additional "risk of fire on shore, until shipped, from date of storage"; charging therefor one eighth of one per cent beyond the premium paid for the hazards of the voyage. *Merrick, J.*, in delivering the opinion of the court, said: "The policy which was issued by the defendant was, in its term, restricted to such property only as should be on board vessel or vessels bound on voyages from one port to another. Unless, therefore, the express stipulations contained in the policy were in fact, and could lawfully be, changed and enlarged by the subsequent agreement made by the plaintiffs with P. & B., as the agents of the defendants, the latter were and could be under no liability for the cotton destroyed by fire in the storehouse at New Orleans. But it is now a perfectly well-settled doctrine that a written contract may be materially varied and changed by subsequent agreements orally entered into by the parties at any time before there has been a breach of its stipulations. This is very fully and emphatically stated by Lord *Denman*, in *Goss v. Lord Nugent*, 5 B. & Ad. 65, and 2 Nev. & Man. 33, 34. He there says: 'After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any man-

ner to add to, or subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will thus be left by the written agreement.' This principle of law, thus stated and explained by Lord *Denman*, has been distinctly sanctioned and adopted by this court. *Cummings v. Arnold*, 3 Met. 486. And Mr. Justice *Wilde*, in giving the opinion of the court in that case, refers to numerous authorities, which are considered by him as fully upholding and sustaining it." The opinion then considers the point as to whether the defendants were authorized to insure in the manner they did; concludes that they were, and that it was a good and sufficient contract, and continues: "In the view we have taken of the character and effect of the contract between the parties, it is obvious that an indorsement upon the policy of the property to be insured against the peril of fire while it was on shore was not essential to subject the defendants to legal liability under the new or modified contract. Such omission, therefore, to indorse it till after the loss, though urged as an insuperable objection to the maintenance of this action, is immaterial. . . . Nor is it a sufficient foundation for the further objection of the defendants, that the agreement to insure fixes no certain time when the risks were either to commence or be determined, as it appeared that the property were destroyed in nine days after it was insured, when ready to be shipped."

thieves.” An indorsement was made on the policy of a certain sum on cargo on a canal-boat, and it was held that the policy, by force of the indorsements, covered the cargo so indorsed against the ordinary risks of canal navigation.<sup>1</sup>

By far the most difficult question which has arisen under policies of this kind relates to the obligation of insurers to indorse shipments declared to them by the insured, as made under the policy. The adjudication upon this question does not enable us to give with certainty a rule which would always answer it. It is obvious, that, if the insurers are bound to accept or make an indorsement, their refusal to do so cannot discharge them from their liability. But it is equally obvious that the terms of the policy may make any indorsement ineffectual until the insurers do accept or indorse it, and that they have a right of election on this point. We should doubt very much whether the common policies of this kind give, or are intended to give, this right to the insurers. By the policy itself a bargain is made by which the insurers agree to insure certain merchandise. They may describe this merchandise as precisely as they please by name, or character, or voyage, or ship; but when a shipment comes distinctly within this description, we cannot doubt that they should be held.

These running policies are now sometimes made with a further reservation as to the premiums, it being provided that they should be fixed at the time of indorsement. In a recent case on such a policy, the Circuit Court of the United States for the district of Maryland held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was for the courts to settle. But, the case going by writ of error to the Supreme Court, the decision was there reversed. We give this case at length in our note, because, by the comparison it draws between common marine policies and such as this, it illustrates much of the law of these policies.<sup>2</sup>

<sup>1</sup> Protection Ins. Co. v. Wilson, 6 Ohio State, 553. laden or to be laden on board the “good vessel or vessels” from Rio de

<sup>2</sup> Orient Mutual Ins. Co. v. Wright, 23 How. 401. Error from the district of Maryland. The suit was brought by the plaintiff below upon a policy of insurance, covering a quantity of coffee, to add an additional premium, if by vessels lower than A 2, or by foreign vessels. The policy contained the following clause in respect to premiums:



The question is always open, whether a shipment declared to the insurers on an open policy comes within the description in the

"Having been paid the consideration for the insurance by the assured, or his assigns, at and after the rate of one and one half per cent; the premiums on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported." The policy was dated 27th July, 1855. The company subscribed at the execution \$ 22,500 as the amount insured. On the 30th July, 1855, the policy was altered by agreement of parties by striking out the words "vessels not rating lower than A 2," as it originally stood, and inserting the words now in the instrument. On the 4th January, 1856, the company subscribed an additional sum of \$ 15,000, and on the 19th of April following, the sum of \$ 25,000. Premium notes were given at the time the different sums were subscribed, at the rate of premium mentioned in the body of the policy. The agent of the company at Baltimore, who negotiated this insurance,—the defendants being a New York company,—stated that when applications are made to enter risks on running policies, they are indorsed at once by him, and the report of such indorsement is transmitted to the company in New York, which names the premium, and this is communicated to the assured; that the premiums specified in the body of the policy are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported; and that the nominal premiums taken on the delivery of a running policy are returned if no risks are reported. In the latter part of August, 1856, the plaintiff applied to the agent at Baltimore for an

indorsement on the policy of the coffee in question, laden or to be laden on board the *Mary W.*, from Rio de Janeiro to New Orleans, which application was communicated to the company in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description in the policy, on account of her alleged inferior character and unfitness for the voyage; but the plaintiff insisting upon the sea-worthiness of the vessel, and his right to the insurance, within the terms of the policy, they fixed the premium at ten per cent subject to the conditions of the policy, or two and one half per cent, as against a total loss. This rate of premium the plaintiff refused to pay. The coffee was duly shipped on the *Mary W.*, and when seventeen days out on her voyage she was lost by stranding, the master being seventy miles out of his reckoning at the time. Evidence was given on the trial, on the part of the company, tending to prove that the *Mary W.* was rated below A 2, and even that she was unfit for a sea voyage, being intended originally for a coasting vessel, and prayed the court to instruct the jury, that if they found from the evidence that the vessel, at the time of the application for the indorsement of the cargo upon the policy, was rated in the office of the company, and other offices of underwriters in New York, lower than A 2, and, being so rated, the company offered to make the indorsement at the premium fixed by them, and that, on the premium being communicated to the plaintiff, he refused to pay it, or assent thereto, then he was not entitled to recover, which prayer was refused; and the court instructed the

policy. If it does come within it, their judgment that it does not cannot discharge them, nor can any act or refusal of theirs found-

jury substantially that the plaintiff was entitled to recover for the loss, so far as the rate of premium was concerned, upon deducting such additional premium to the one and one half per cent as in the opinion of underwriters may be deemed adequate to the increased risk of the coffee shipped in a vessel rating below A 2. The jury rendered a verdict for the plaintiff. The opinion of the court, from which is taken the foregoing statement of facts, was delivered by Mr. Justice *Nelson*, who held: "According to the true construction of the terms of this policy, where the vessel declared or reported by the assured was rated below A 2, the company had reserved the right to fix at the time the additional premium; and unless assented to by the assured, and the premium paid or secured, the contract of insurance, in respect to the particular shipment, did not become complete or binding. The court below held the contrary, the instruction to the jury maintaining that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle; thus placing this policy upon the footing of those where the full premium was fixed, and paid or secured at the time of the execution, and in which no special provisions concerning the premium are inserted. These special clauses are very explicit, and are inserted in this policy for the benefit of the company. We think, independently of the usage and practice of the company under these policies, the import of the language used cannot well be mistaken. The right is expressly reserved to charge

an additional premium upon all vessels reported rating below A 2; and, again, the premiums on risks are to be fixed at the time of the indorsement, that is, when the vessels are reported to be noted on the policy. If the construction rested alone upon the right to add additional premiums upon a given rate of vessels, there might be some ground for the argument that the time for fixing them was open; and, if the parties could not agree, the law must determine the question. But when the parties themselves stipulated, not only that in the particular case additional premium shall be charged, but that it shall be fixed at the time the risk is made known, there would seem to be no room for doubt or dispute in the matter. In the present case there is also the additional special provision, namely, 'and such clauses to apply as the company may insert as the risks are successively reported,' thus providing for any unforeseen or extraordinary risks that might be claimed under the policy. Even if an arbitrator had been agreed upon to fix the additional premium, and he had refused, the contract would have been at an end, as the courts could not appoint one. *Wilks v. Davis*, 3 Mer. R. 507; *Milner v. Gearey*, 14 Ves. 400; Code Napoleon, 1591, 1592; 1 Troplong de vente, Nos. 146, 160. And certainly they could not fix the premium in this case, on the disagreement of the parties, without assuming the right to make a contract for them. The premiums were to be settled when the risks were reported, not at any other period. In the case of policies on goods, 'in ship or ships' to be afterwards declared, and where the full premium is paid or

ed on their judgment. The whole purpose and intention of making such a policy would seem clearly to hold the insurers to

secured at the execution, the policy, even in that case, is a mere outline of the contract, to be completed on making the declaration; but if not made within the terms of the policy, the contract is at an end as respects the particular shipment. In *Entwhistle v. Ellis*, 2 Hurlst. & Norm. Exch. 549, 556, 1857, *Channell, B.*, observed, speaking of a policy of this description, at the time of the making of the policy, certain particulars were agreed upon, others were left to be settled. The policy was to be on rice, to be warranted free from particular average, to be sent 'in ship or ships.' Something more was wanting to make a binding contract. The parties can only fill up such particulars as are left in blank so as to be consistent with the policy.

"Applying this principle to the policy in the present case regarding the special clauses therein, something more is required to make a binding contract than the declaration of a ship rating lower than A 2, to bring the subject within the policy; the additional premium fixed by the company was to be paid or secured. We have found very few cases in the books upon the peculiar class of policies before us, and no mention of them in the text-writers on the subject of insurance. The case bearing more directly than any other upon the point in question is *Dounville v. The Sun Insurance Co.*, 12 La. Ann. 259. The contract of insurance there was in an open or running policy of the class in which the full premium was paid or secured at the execution. But a modification was afterwards made, by which 'it was agreed that this policy shall cover merchandise to the address of the

assured from European ports to New Orleans, via Boston or New York, subject to additional premium as per tariff.' The court held that, by the terms of the policy, the party desiring to be insured upon any particular shipment of merchandise was bound to present to the company an invoice of the goods (this had been provided for in the policy), and pay or secure the premium; that the party was not bound to report any shipment except at his election, nor could the company demand premium on the same, unless presented for insurance; and that on a policy of the class before the court, there must necessarily exist as many contracts of insurance as there are indorsements on the policy of separate shipments. We have examined this case more at large, from the novelty of the questions involved, as they do not seem to have been the subject of consideration by the courts or text-writers, than from any difficulty we have felt in the view to be taken of them; and from the examination we have given to the peculiar features of the policy, we entertain no doubt but that the charges made, and which have been particularly referred to, will be found in practice beneficial both to the insured and insurer. The only defect, perhaps, existing is a want of provision for the case which may happen where the declaration of report of the ship is not made until the loss is known, that is, where the ship and the loss are reported together. According to the old form of the policy, the full premium being ascertained and fixed at the date of it, it is well settled that, though the declaration is not made till the loss is known, if made with due diligence after

this extent. As to all shipments subsequent to the policy, the bargain may be understood to be, on the part of the insurers, a

advices of the ship, the underwriter is liable. There may be some difficulty in applying that rule to the class of policies before us. It was rejected in the case of *Dounville v. the Sun Insurance Co.*, above referred to. Upon the whole, after the best consideration we have been able to give to the case, we are satisfied that the ruling of the court below was erroneous, and the judgment must be reversed." In *Sun Mutual Ins. Co. v. Wright*, 23 Howard, 412, the same facts as in the previous case appeared in evidence, the same ruling was made in the court below, and on error was reversed in the higher court on the same ground. Mr. Justice *Clifford* dissented in both cases, and in his opinion, p. 414, made the following points: "Under the instructions of the court, the jury returned their verdict for the plaintiff, and the defendants excepted. That instruction, so far as it is necessary to consider it at the present time, affirms that, by the true construction of the policy, the contract between the parties, under the circumstances of this case, as disclosed in the evidence, was complete when the shipment of goods was reported by the plaintiff, and the indorsement was made upon the policy by the authorized agent of the defendants. In that view of the case I entirely concur. When the report was forwarded by the agent, the only objection made to the risk was, that the vessel was unsuitable, or that she was unseaworthy. That objection was repealed, and finally the plaintiff was told, that, if he insisted upon the indorsement, it would only be made upon the condition that the policy should not attach, if it turned out that the objection

of the defendants was well founded. He accepted the condition, and the indorsement was so made. After the indorsement was made, it was too late for the defendants to reconsider the position they had voluntarily assumed. *E. Carver Co. v. Manuf. Ins. Co.*, 6 Gray, 214. Suppose they had a right, as a condition precedent, to demand the payment of the additional premium before making the indorsement; they did not insist upon the right, but voluntarily waived it. [The majority of the court held *contra*.] They had already received the policy rate of one and one half per cent, and to the present time have neglected to refund the same. Prepayment of the policy rate was a sufficient consideration to uphold the contract; and certainly it will not be denied that they might waive the right to claim prepayment of whatever might be due to them for the additional premium contemplated by the policy. But their right to demand the additional premium as a condition precedent to the indorsement cannot be admitted. Such a construction would defeat the policy, and therefore must be rejected, unless the language of the instrument is imperative to that effect. 1 Phil. Ins. § 438; *Kewley v. Ryan*, 2 H. Black. 343. Policy rate is not the actual rate of adjustment between the parties in any case under this instrument, unless, perchance, it happens to be the established rate at the time the return is made to the company. *Crawford v. Hunter*, 8 T. R. 16, note. Addition or deduction from policy rate is to be made in all cases so as to make the sum paid and received conform to the established rate. Something, therefore, remains to be done in

promise to make future insurance, and that there were subsequently as many contracts of insurance as there were indorsements on the policy. This was indeed held in an interesting case arising under a policy of this kind.<sup>1</sup> It would follow that the

respect to every risk, irrespective of the character of the vessel. In case the shipment is by a vessel rating A 2, or by a foreign vessel, an additional premium may be added; but there is no stipulation in the instrument that it shall be paid in advance of the indorsement; and there is nothing in the language of the instrument from which to infer that such was the intention of the parties. That inference is wholly gratuitous, and, in my judgment, unfounded. When adjusted, the sum to be paid must conform to the established rate at the time the return was made to the company. If the parties cannot agree what the established rate was at that time, like other matters of controversy, it must be settled by the judicial tribunals. *Harman v. Kingston*, 3 Campb. 150; 1 Arnould on Ins. 175, 177; *Smith's Mer. Law*, 208; *U. S. v. Wilkins*, 6 Wheat. 144. Unless this be the true construction of the policy, then it is a delusion which ought to be shunned by every business man. Loss often occurs before the notice of the shipment. The assured cannot adjust the additional premium, until he knows by what vessel the shipment has been made, so that, if it be true that the contract is incomplete until the additional premium is adjusted and paid, then open or running policies for the insurance of goods from distant ports are valueless. They are worse than valueless as generally understood, because they have the effect to delude and deceive. For these reasons, I am of opinion that the judgment of the Circuit Court ought to be affirmed."

<sup>1</sup> In *Dounville v. Sun Mut. Ins. Co. of New York*, 12 La. Ann. 259, the policy, which was on goods and merchandise to be laden on board — vessels, contained this clause: "This insurance is declared to be on merchandise as interest may appear, adding ten per cent to invoices. The risks to attach from the time of shipment, which are to be reported to the insurers (on receipt of invoices) for indorsement." It was afterwards provided that the policy should cover merchandise to the address of the assured from European ports to New Orleans, via Boston or New York, subject to additional premium. One of the members of the firm insured went to Paris in order to purchase goods, and wrote home that his purchases were made with the exception of a few articles, for which he should wait until the last moment, and that he had retained his passage aboard the steamer *Arctic* for the 20th of September. Information was given to the insurance office that he was about to leave France with goods, by the *Arctic*, and the company said it was all right, but that they would be compelled to wait the receipt of the invoice in order to indorse this on the policy. The vessel sailed, and was lost on the passage; and, after the loss was ascertained, a list of the amount of the goods which were purchased in Paris, with their value, was obtained from an agent in that city. The evidence rendered it probable that goods to the amount stated had been packed in the trunks of the person before mentioned, and had been lost with him. No bill of lading was taken, and

policy itself insured nothing, and was not even a contract to insure any shipment of the insured ; and that the contract took effect on any shipment, only after all the requirements of the original policy were complied with ; but that then it took effect by force of that policy.

there was no other evidence that the goods had been shipped as part of the cargo of the vessel. The list of articles was presented to the insurance company, but they refused to indorse it or pay the loss.

The court held that there were as many contracts of insurance as there were indorsements on the policy, and that the delivery of the policy did not constitute a contract to insure any goods that might be sent, and that the contract did not take place till the following things were shown, namely, consent on the part of the plaintiffs, a production of the invoices, and the payment of the premium in her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, namely, in the trunks of a partner of the house as baggage ; and on behalf of the company an agreement to take the risk in that form. The court, by *Merrick*, C. J., say : " The question is presented by the state of facts, whether there was any contract of insurance relative to the goods lost on the Arctic. We think it must be answered in the negative. By the terms of the policy, the party desiring to be insured upon any particular shipment of merchandise was bound to present to the insurance company an invoice of the goods, and pay or secure the premium to the company. When this was done, and the amount of the invoice was indorsed upon the policy, the contract for insurance was complete. On a policy of insurance in this form, there must necessarily exist

as many contracts of insurance as there are indorsements upon the policy of separate shipments of goods. The delivery of the policy four years previously did not constitute a contract of insurance upon goods which might be shipped by the Arctic. Something more was required, namely, consent on the part of the plaintiff, a production of her invoices, and the payment of the premium on her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, namely, in the trunks of a partner and employee of the house as baggage ; and on behalf of the company an agreement to take the risk in this form. Nothing of this kind occurred. No amount was stated to the company, for the agents of the plaintiff did not know what quantity of goods would be sent. No premium was offered ; and, if the Arctic had arrived in safety, the company would have been without power to collect the premium. Nothing was agreed upon beyond the policy. How then can it be construed to cover the loss of goods packed in the trunks of travellers, not subject to the payment of freight, nor covered by bills of lading, nor stowed with the cargo, nor contained in covers or boxes commonly subject to entry at the custom-house ? The company has a right to stand upon its written policy, and say to the plaintiff, *Non in hæc federa veni*. The goods were not in a legal sense laden on board the Arctic, nor were the invoices presented, or premium offered, until the loss was ascertained."



There is a further conclusion to be drawn from this case, which we do not remember to have met with in any other. The goods in reference to which the question arose were intended to be brought over in the trunks of one of the insured as baggage. It was held that this was "an unusual manner" of transporting the goods, and that the insurers would not be liable, unless this unusual manner was communicated to them, and they agreed to take the risk in that peculiar form.

We have no doubt, whatever, that the general rules as to concealment and misrepresentation would apply to all indorsements; but this case goes somewhat further; for it does not appear that carrying goods in a trunk exposed them to any peculiar danger, or was a fact material in the sense that a non-statement of it would avoid a common policy. Perhaps this case may be held to assert as a rule, in running policies, that they are intended to cover only adventures or shipments answering to the description of an ordinary kind, and to be carried in an ordinary way, and that all peculiarities in the goods or the transport must be communicated. We incline to think, however, that it would be safer and better for all parties to decide all questions of this kind by the common rules as to concealment and representation.

It is certainly not necessary that an indorsement should be made, unless it be required by the policy. Nor even that it should be declared, if it be not so required, because the insurers cannot hold the insured beyond the requirement which they themselves make.

In some cases, the courts have been very liberal in their construction of this requirement. Thus, a policy provided that "all sums placed at risk under this policy are to be indorsed thereon," and a shipment of goods was lost, without any indorsement. But the insurers were held, on proof that the insured considered this shipment as made under the policy, that it came within its terms, that he intended in good faith to have the risk covered by the policy, and that he could not, although acting with reasonable intelligence, cause the indorsement to be made in sufficient season.<sup>1</sup>

<sup>1</sup> E. Carver Co. v. Manufacturers' goods "lost or not lost on board of any Ins. Co., 6 Gray, 214. In this case an steamer or steamers at and from New open policy of insurance was made on York to New Orleans; all sums placed



This case declares that the insured may make an indorsement after a loss takes place, if there is no want of diligence on their

at risk under this policy to be indorsed thereon." A shipment of goods was made to New Orleans on a steamer from New York, and the goods were lost by a peril of the sea, and the loss was known to the assured before he, acting with reasonable diligence, had caused the risk to be indorsed on the policy. The court held, that, if the assured intended in good faith to have the risk covered by the policy, the insured were bound to indorse it. The court, through Mr. Justice *Thomas*, said: "We think that the just and reasonable view of the contract is, that the plaintiffs, having paid their premium for insurance to a fixed amount, within a fixed term of time, on any cotton-gins to be shipped by any steamer between the ports named, had the right (under the limitations hereafter stated) to elect upon which of the shipments made they would apply the insurance stipulated for; and that it was the duty as well as the right of the defendants to indorse such risks upon the policy; and, if this be so, that the defendants cannot escape from their responsibility by a refusal to indorse a shipment which the plaintiffs reasonably request them to indorse.

"The ground of refusal to indorse was, that the property had already been lost. But the policy was to cause the plaintiffs to be insured on gins, 'lost or not lost.' And while, on the one hand, it is certainly plain that the plaintiffs cannot, as to any shipments made by them and coming within the conditions of the policy, wait until they hear that the steamer is either lost or in peril, it seems to be equally clear that if the party, intending in good faith to have the shipment covered by the policy, notifies the

insurer of his election seasonably, the insurer cannot refuse, because he has in the mean time, that is, between the shipment and the notification, heard of a disaster to the steamer or loss of the goods. There must be, of course, entire good faith in the proceeding; for in this, as in many other cases, the insurer confides in the good faith of the assured. When the election of the plaintiff is notified to the office, the insurance takes effect from the shipment, and covers the goods, lost or not lost. . . . The defendants say that the making of subsequent indorsements of other shipments, at the request of the plaintiffs, was in itself a waiver of any claim for this shipment; inasmuch as the amount covered by the indorsements, excluding the sixteen gins in controversy, would exhaust the policy, excepting the small amount of four dollars and a half, if the two indorsements of August 31, and September 10 are included. Looking at the indorsement of August 31, only two days after the notice of the abandonment and claim for loss, and, in connection with it, at the subsequent negotiation of the parties, it is quite clear that it was not intended by the plaintiffs' agent as a waiver or release of the previous loss, if he had authority to waive or release it. The argument assumes that the subsequent indorsements effected a valid insurance, and that the defendants would have been necessarily liable for the losses of these shipments. Possibly, if the insurers made intentionally, with knowledge of the facts, indorsements exceeding the amount fixed in the policy, they might be liable for the loss, — the insured being liable also for the additional premium. But if the defend-

part. It went still further, and held that the claim was not waived by an indorsement of other risks which would almost exhaust the policy, and then receiving back from the insurers the premium for the balance.

An English case goes perhaps still further than this. The insurance was "on sugar and cotton as might thereafter be declared and valued." There was no declaration of interest, and no valuation, but it was held that the insured might recover by proving on the trial interest and value.<sup>1</sup>

A case in Missouri would seem to contradict this. There the phrase was, "indorsements on this policy to be evidence of property at the risk of the company, under the same." A shipment was made to the insured within the terms of the policy, but he received no invoice or description of the goods from which an indorsement could be made, until after he had received intelligence of their loss. He then offered to make an indorsement of the shipment as soon as he should receive a sufficient description

ants were liable for the sixteen gins, and the subsequent indorsements were made by mistake or inadvertence, upon a policy already exhausted, the defendants would not be liable for such losses. It is assuming the question to say that the defendants would be necessarily liable on the subsequent indorsements, and therefore were not liable for this loss. It was, after all, a question of intent; and, taking the whole evidence, the jury would have been well warranted in saying the plaintiffs did not intend to release their claim." See also *Hartshorn v. Mut. Ins. Co.* 5 Bosw. 538.

<sup>1</sup> *Harman v. Kingston*, 3 Campb. 150. Policy is stated in the text. The report continues: "Lord *Ellenborough* at first entertained some doubts as to whether, upon a policy of this sort, the declaration of interest is not a condition precedent, which must be fulfilled by the assured before the liability of the underwriters attaches; but, after further consideration, his lordship said: 'I have now fully made up my mind, that, where

there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power, by duly declaring and valuing before the loss, to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter in evidence at the trial.'" And see *Craufurd v. Hunter*, 8 T. R. 15, note a. In this case the policy was declared by a memorandum to be on ships and goods as should be thereafter declared and valued; and there was an averment in the declaration that notice on the loss which happened to the ships and goods (therein mentioned) arrived in England before any declaration or valuation was or could be made of the said ships and goods. And one of the causes of demurrer assigned was the want of such declaration or valuation. The court intimated an opinion, that, as the loss had happened before any declaration of the value could be made, the plaintiffs were excused by the necessity of the case from making any.

of the goods to enable him to do so. This the insurers refused to accept. The court held the insurers not liable for the loss; not denying the law of the English case, but founding their different decisions on the difference of phraseology in the two cases.<sup>1</sup> But this difference does not seem to be sufficient to leave both courts in the right.

A recent case in England has attracted much attention. The Hong-Kong Marine Insurance Company had an agent in London, who was authorized to effect policies insuring the Hong-Kong Company against any risks they had taken in excess of £ 5,000 on any one ship. The policies made by this agent were open or running policies, — each being for a determinate amount, usually £ 10,000, and as this amount was exhausted, or, as it was usually expressed, “consumed,” by indorsements, another policy was issued “to follow the preceding,” thus making of all when taken together a kind of continuous insurance. On the 16th of March a telegram was received in London, stating that the ship *Red Gauntlet* was “burnt and stranded.” On the 17th of March the agent took out a policy, the former policy being “consumed.” He said nothing about the *Red Gauntlet*, not knowing that his principals, the Hong-Kong Company, had any interest in her. On the 21st the agent received instructions that policies had been effected “on the *Red Gauntlet* and *Surrey*.” The agent then prepared to indorse the *Red Gauntlet* on the policy last issued. The defendants denied his right to do this. On receiving further particulars, the agent made the indorsement on the policy, and presented it to the defendants, who “refused to accept or acknowl-

<sup>1</sup> *Edwards v. St. Louis Perpetual Ins. Co.*, 7 Missouri, 382. Opinion was delivered by Mr. Justice *Napton*: “The only question is, whether the plaintiffs can recover for goods which were not indorsed on the policy; whether the indorsement on the policy be a condition precedent to the plaintiff’s right to recover.” And he then proceeds to discuss the different meanings to be attached to the phrases, “as might be thereafter declared and valued,” used in *Harman v. Kingston*, *supra*, which he considers to have now a fixed judicial meaning, and “indorsements on the policy, to

be evidence of property, at the risk of the company,” which language was used in the policy in suit. Considering that “the plain meaning of the stipulation is, that the declaration of property and of value must be made in a specific mode, to wit, by indorsements on the instrument containing the terms of the contract, and in that way only, could the indorsement be made after the loss had happened? Of course not: the risk would be determined. The whole object of the indorsement would be defeated by such a construction.”

edge it," mainly "on the ground that the burning of the Red Gauntlet was known to both parties before the policy was effected or applied for." The case was argued by very able counsel, and the Justices of the Queen's Bench gave their opinions *seriatim*, and were unanimous in deciding in favor of the insured. But this decision has been severely criticised. For example, in the latest English work on marine insurance, the author says: "Now, strangely, by the doctrine laid down in *Gledstanes v. Royal Exchange Assurance Company*, an insurance may be effected and a loss claimed, where before effecting insurance both insured and insurer know of the loss of a ship or goods, but do not know (i. e. are not certain) that the interest thus destroyed is to rank on the policy so opened."<sup>1</sup> And again: "The right to declare interest seems pushed to an extreme in the late case of *Gledstanes, &c.* The loss of the ship was known both to insured and insurers, not only before it had been ranked on an open policy, but before the policy had been effected on which the court afterwards decided it had a right to rank. . . . As the case stands, it appears to be competent to declare, on a policy which has not begun to exist, an interest which has ceased to exist."<sup>2</sup>

While we cannot concur in all of this criticism, we admit that, in this case, the right "to declare" on an open policy is carried further than in any other case. But the reasons given by the court seem to us to have great, and, on the whole, convincing weight. It must, however, be admitted that this decision shows that insurers upon the common running policies lay themselves open, we do not say to impositions, but to burdens from which it may be wise for them to seek protection by specific provisions. We give at length the arguments of counsel and the opinions of the Judges in this case, as we find them in the *Law Times*.<sup>3</sup>

<sup>1</sup> Hopkins's Manual of Mar. Ins. p. 234.

<sup>2</sup> Same work, pp. 260, 261.

<sup>3</sup> *Gledstanes and others v. The Corporation of the Royal Exchange Assurance*, Queen's Bench, November 11, 1864, 11 *Law Times*, 305-309. *Lush, Q. C.* (*Hannan* with him), for the plaintiffs: "The policy was an open policy to cover all risks which the Hong-Kong Company

might take in excess of £ 5,000. The policy attached as soon as the risk commenced in Calcutta. It ran upon all the vessels insured by the plaintiffs' principals, in the order that the risk attached. It did not depend on any appropriation to any particular vessel. It is not necessary, however, for the plaintiffs to contend that length, but only that the policy attached as soon as it was appropriated to

The case will be found interesting and instructive, not only as to the legal questions considered, but in the information it gives as

the risk. Then, as soon as it was known that there was an excess beyond £ 5,000 on any particular ship, it was the practice, and they were bound to notify it to the defendants; but that was not a condition precedent to the policy attaching. *Harman v. Kingston*, 3 Campb. 150. Here, as soon as it was known that there was an excess beyond £ 5,000 insured on the *Red Gauntlet*, the defendants were told that the plaintiffs were to put on the *Red Gauntlet*, and when they received full particulars they forwarded them to the defendants."

*Bovill*, Q. C., (*Watkin Williams* with him,) contra: "It is a mistake to assume that these policies were all one continuous policy. On the 17th March, the plaintiffs had consumed all the existing policies, and they had run off. The next policy was on the 19th March, and the memorandum indorsed on it, 'to follow the 17th March,' meant to follow the policy which was consumed on the 17th March. Then, when the policy of the 19th March was effected, it was known that the vessel was lost, and the policy could not attach. Secondly, the policy was to cover the excess beyond £ 5,000 taken 'on any one ship as may be declared.' A declaration was therefore necessary, because the policy was not on all the ships, and as soon as, but not until, the ship was declared, did the policy attach. Until the particular ship was declared, there was nothing on which the policy could attach."

*Lush*, in reply: "Here there was no knowledge of the loss of that which was the subject of insurance at the time this policy was effected. All that was known was that the vessel was lost, but

not that the Hong-Kong Company had any interest beyond £ 5,000 in the goods on board. *Mead v. Davison*, 3 A. & E. 303. The argument that the policy does not attach until the declaration is made practically comes to this, that the defendants do not insure any of the plaintiffs' ships that do not arrive safely, because some time, about six weeks, must elapse between the appropriation at Calcutta and the declaration in England. In no case is a declaration a condition precedent to a policy attaching. 1 Arnould on Insurance, 175."

*Cockburn*, C. J.: "I am of opinion that our judgment should be for the plaintiffs. The first point for our consideration is, whether there is any sufficient policy to cover the loss incurred. It is true that the policy which was appropriated to the risk by the assured on the goods on board the *Red Gauntlet* was posterior, in point of time, to the risk; but I think we must take it that the policy was made in anticipation of a risk to be afterwards appropriated and declared. When we look at the course of dealing, we see it was intended that the plaintiffs' principals, the Hong-Kong Company, should always be covered by insuring with the defendants any risk they might take in excess of £ 5,000 on goods in any particular ship. Mr. Bovill did not attempt to deny, that, if the policy in question had been effected on the 16th March instead of on the 19th, it would have been sufficient to entitle the Hong-Kong Company to recover, although made after the appropriation. But then he contended, that, although that might be so, yet the policy is vitiated, because the ship, the *Red Gauntlet*, was, to the knowledge of both

to the course of practice of the London insurers on open or running policies.

parties, lost at the time the policy was made. The argument is capable of two answers. First, the answer given by Mr. Lush is a satisfactory one, namely, that even if the agent at Calcutta had known of the loss, and although it was not known as a matter of common knowledge there, this would not have vitiated the policy, because the loss of the ship was not the risk insured, but the excess beyond £ 5,000 which the plaintiffs might have in any particular vessel. Now, when this policy was effected, it was not known that the Hong-Kong Company had any particular interest in the goods on board of the Red Gauntlet, and therefore the plaintiffs had no knowledge of the loss that was covered by the policy. Be that as it may, here the loss of the Red Gauntlet was common knowledge to both parties, and, in the absence of authority to the contrary, I, for one, should hold that, if an underwriter chooses to insure, with the knowledge, common to both the insurers and the insured, of the loss of the thing insured, he is not the party to say that the insurance is to go for nothing. He may have had good reasons for taking the risk. I think, therefore, that there is nothing in the circumstance of the loss of the ship to vitiate the insurance. That being so, then comes the question whether the declaration here, having been made subsequent to the loss, is good. The policy gives the assured the right to appropriate it to any particular ship, but such appropriation must be declared to the defendants. Now, Mr. Bovill contends that, until the declaration is made, the policy does not attach. To put that construction upon it would be to frustrate the intention of

the parties altogether. The risk intended to be protected was any excess beyond £ 5,000 on goods in any particular vessel which the Hong-Kong Company might have insured. But whether the Hong-Kong Company would have an excess in any particular vessel would not be known until the loading was complete and the vessel about to sail; and the fact of such excess could not be communicated from Calcutta to the plaintiffs for about six weeks afterwards, and in the mean time the vessel would have started on her voyage. Could it ever have been intended that the ship for so much of her voyage was to be unprotected by this insurance? I think most certainly that that was not what was meant by declaring the vessel. But there are two other constructions which may be put on the meaning of declaring the vessel, equally favorable to the plaintiffs. It may be said, that, looking at all the circumstances, all that could be meant by the appropriation was, that the assured by some overt act from which they could not recede should fix the vessel on which the policy was to attach, and that, when they had once done that, although the fact might not come until a later period to the knowledge of the underwriters, then all was done which the policy required. It is not, however, necessary to go that length; it is enough to say that it is sufficient if the declaration be made on the first convenient occasion. By this construction the underwriters are protected, because, if there is any attempt to reappropriate after a particular vessel has been declared, it will be a fraud on the underwriters. In some shape or other the appropriation must be so



made that the vessel shall, in the interval between appropriation and declaration, be covered by the policy. Every object is satisfied the moment it is settled that the parties have appropriated, and the declaration thereof is made to the underwriters at the reasonably earliest period. I am glad to find that our view accords with that laid down in Mr. Arnould's treatise on Marine Insurance. On these grounds I think our judgment must be for the plaintiffs."

*Crompton, J.:* "I am of the same opinion. The real construction is that this policy was intended to follow the former one between these parties, and the object was to cover the excess beyond £ 5,000, which the Hong-Kong Company might insure in any particular ship. They show that it was intended to keep on renewing this arrangement from time to time. It was intended to give the plaintiffs all the rights under the new policies which they had under former policies. The main question in the case is, whether the policy attached, and whether the declaration was made in time. I do not agree with that part of Mr. Lush's argument in which he said that it was meant that the risk should attach on all the ships in their order; but I think that when the risk was appropriated to any particular ship by the company abroad, the policy attached. Whether that is so or not, I think the appropriation here was communicated in good time. My Lord Chief Justice has pointed out, during the argument, that the whole voyage would not be covered by the construction contended for by Mr. Bovill. I take what was intended to be this: 'You may apply the policy to any risk you please, but you must be bound by the appropriation you make when communicated to us in London. In one

sense it is a positive condition, and it means that the appropriation is to be declared in London according to the instructions from abroad.' I adopt Lord *Ellenborough's* view that the naming of what it is to which the policy is to attach is a power given to the assured, and that it may be exercised at any time so long as there is no fraud. There is nothing here to show that that power was taken away when the declaration was made. The plaintiffs therefore are entitled to judgment."

*Millor, J.:* "I am of the same opinion. The nature of the contract was, on the part of the defendants, to protect themselves against a double appropriation of the risk, and, on the part of the Hong-Kong Company, to protect themselves against any excess beyond £ 5,000 insured by them on goods in any particular ship. The loss of the ship is not the risk insured against, but the excess beyond the £ 5,000, and in that view the knowledge of the loss of the ship is not material. I entirely agree in what my brothers have said, and I will not travel over the same ground again."

*Shee, J.:* "I am of the same opinion. The defendants, by a contract of the 19th of March, have undertaken to insure the excess of risk above £ 5,000 which the Hong-Kong Company may have on goods in any particular ship. The *Red Gauntlet*, which had been insured by the Hong-Kong Company for a risk above £ 5,000, was one of that class of ships. On the plain meaning of the words of the contract, the excess of risk on the *Red Gauntlet* would be within the contract. At the time the policy of the 19th March was effected, it was known to both parties that the *Red Gauntlet* was lost, but it was not known that the *Red Gauntlet* was one of the ships which had been insured by the



Hong-Kong Company. To vitiate the policy there must be knowledge that the risk insured against was terminated. It was not known that any risk on the ship Red Gauntlet had been taken by the Hong-Kong Company. Then it was said by Mr. Bovill that the ship was not declared, and that therefore the policy did not attach. The contract is that the defendants will insure, and the plaintiffs engage to declare the ship. That can only mean that the assured is to declare in what ship the Hong-Kong Company have a risk exceeding £ 5,000. The appropriation is the thing done in Calcutta. The taking of the risk and the policy attached upon the appropriation. The declaration is of an appropriation made abroad. The defendants could not, in my opinion, have defeated the policy if they had known that the risk insured against, as well as the ship, had been lost." Judgment for the plaintiffs.

## CHAPTER XII.

## OF WARRANTIES.

SECTION I. — *Of Express Warranties.*

THESE are stipulations or promises of the assured, in the policy, that certain things exist or shall exist, or have been or shall be done. It is to be noticed that these are warranties; and this circumstance, on the general principles of the law of contracts, excludes many inquiries which might otherwise be made. Thus, the warranty is equally binding, and a breach of it equally fatal, whether the thing warranted be material or immaterial.<sup>1</sup> Nor is it any legal excuse for the breach, or any protection against its consequences, that the breach was not intended by the insured, and cannot be imputed either to his design or his fault; and the acts of all employed by him or of any other person, if they violate the warranty, are equivalent to a breach of it by himself. Because the question is not by whose agency is the warranty broken, but whether it be broken, for that avoids the contract.<sup>2</sup> And it must be not only substantially but strictly complied with; “nothing tantamount will do,” says Lord Mansfield.<sup>3</sup> But that will be a

<sup>1</sup> Blackhurst v. Cockell, 3 T. R. 360, per Buller, J.; Newcastle F. Ins. Co. v. Macmorran, 3 Dow, 255, 262.

<sup>2</sup> Duncan v. Sun F. Ins. Co., 6 Wend. 488.

<sup>3</sup> Pawson v. Watson, Cowp. 785. In De Hahn v. Hartley, 1 T. R. 343, 2 T. R. 186, the ship was warranted to sail “from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards.” She had only forty-six men on board, when she sailed from Liverpool, but took six more at the Isle of Anglesea, only six hours afterwards. The loss was in no way owing to the deficiency. Held, that the

policy was void. Lord Mansfield said: “A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with.” In Sawyer v. Coasters’ Mutual Ins. Co., 6 Gray, 221, a vessel was insured for one year from the 21st of September, 1847. The vessel sailed from New York on the 21st of August, 1847, with grain in bulk bound to Ballisidore in Ireland, and on the 24th and 25th of September, while entering the

sufficiently strict and literal compliance or performance, which is so if the warranty is construed and interpreted according to usage and the actual intention of the parties.<sup>1</sup> And sometimes this strict compliance operates in favor of the assured. A question has arisen, where different subjects are insured by the same policy, whether the contract is an entirety to such an extent that a false warranty as to one subject would render the whole contract a nullity. We give in the notes the result of adjudication upon this subject. It will be seen that the cases cited relate to fire policies. We do not know that this question has been distinctly decided in an action upon a marine policy; it has occurred, however, in practice. It would not be easy to state a definite principle which should make a difference on this point between these two kinds of insurance. And yet we have some doubt whether the construction which makes the contract of insurance an entirety, with all the consequences thereof, would be applied to marine policies with quite so much severity as in some of these fire policies.<sup>2</sup>

harbor, received the injuries complained of. The policy contained the clause: "Said vessel not allowed to carry grain in bulk across the Atlantic." It was contended, on the part of the plaintiffs, that the warranty was to be construed literally, and that, when the policy was effected, the vessel was entering the harbor, and did not afterwards cross the Atlantic with grain in bulk. But the court held that the policy did not insure the vessel if laden with grain in bulk, on a voyage across the Atlantic, and that, at the time of the loss, she was carrying grain in bulk on such a voyage.

<sup>1</sup> In *Bean v. Stupart*, 1 Doug. 11, the ship was warranted to have "thirty seamen, besides passengers." The word "seamen" was held to include "the steward, cook, surgeon, some boys, and apprentices."

<sup>2</sup> In *Smith v. Empire Ins. Co.*, 25 Barb. 497, it was held, that, where the same policy insures a house and furniture, although at a separate valuation,

and the policy is void as to the building by reason of a false warranty as to encumbrances thereon, it is void as to the furniture also, although there is no encumbrance on the furniture. This case overrules *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122, which case was also doubted in *Wilson v. Herkimer Co. Mut. Ins. Co.*, 2 Seld. 53. In *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342, two buildings were separately insured at a separate valuation in the same policy. One of the buildings was alienated by the insured, and it was contended that this avoided the policy as to both. *Fletcher, J.*, said: "But the shop was valued separately, and was insured separately, as a separate, distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern-house and the shop being insured separately, the alienation of one would no more affect the insurance on the other

A warranty must be a part of the policy; and may be written upon any part of it, but not upon other papers or documents, unless it is expressly referred to as a warranty in the policy.<sup>1</sup> But any explicit allegation or assertion of a fact may be sufficient as a warranty thereof. As, for example, where a vessel is described as the "good American ship called the Rodman," this is a warranty that the ship is American.<sup>2</sup> And a statement that a vessel was in port on a certain day has been held to be a warranty of that fact.<sup>3</sup> It has been also held that a statement that "the goods belong to the plaintiffs, American citizens," is a warranty of their neutrality, and not a statement merely.<sup>4</sup> In one case the insurance was stated to be for the account of M. Mackay, Jr., of Boston. This was considered as equivalent to a warranty that he was owner, and as he was known to the parties as an American residing in Boston, it was held to be a warranty that the property was American.<sup>5</sup> It is however a general rule, that the statement must be direct, and not collateral. As where a

than if they had been insured in separate policies." In *Brown v. People's Mut. Ins. Co.*, 11 Cush. 280, real and personal estate were insured at a separate valuation in the same policy. One premium note for the whole insurance was given, and the policy secured a lien on the whole property insured to secure the payment of assessments. The real estate was encumbered by a mortgage, which was not disclosed to the insurers, and it was held that the policy was void as to the whole amount insured. The court said: "The contract being entire, and one premium note being given, the lien for the security of the same was affected by the misstatement." In *Lee v. Howard Fire Ins. Co.*, 3 Gray 583, the defendants, in consideration of a premium of \$46, insured the plaintiffs "\$1,150, to wit, \$1,000 on their chair shop, tub and pail factory, saw-mill, and store-houses, all connected, in Orange, \$150 on their blacksmith shop near the above." This was held to be an entire contract.

<sup>1</sup> *Bean v. Stupart*, 1 Doug. 11; *Kenyon v. Berthon*, 1 Doug. 12, note, where it is held that a statement is not a warranty unless written upon the policy. See also *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Glendale Woollen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Routledge v. Burrell*, 1 H. Bl. 254; *Williams v. New Eng. Mut. F. Ins. Co.*, 31 Maine, 219.

<sup>2</sup> *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Atherton v. Brown*, 14 Mass. 152; *Higgins v. Livermore*, 14 Mass. 106; *Lewis v. Thatcher*, 15 Mass. 431; *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127; *Goix v. Low*, 1 Johns. Cas. 341; *Murray v. United Ins. Co.*, 2 Ib. 168; *Vandenheuvel v. Church*, 2 Ib. 173, note.

<sup>3</sup> *Kenyon v. Berthon*, 1 Doug. 12, note.

<sup>4</sup> *Walton v. Bethune*, 2 Brev. 453.

<sup>5</sup> *Kemble v. Rhinelanders*, 3 Johns. Cas. 130.

vessel is stated to be called the American ship President, this is no warranty that she is an American vessel.<sup>1</sup> Nor is the calling of a vessel by an English name a warranty that she is English.<sup>2</sup> Nor is a stipulation that the insurers are not to be liable for damage to or from the sheathing of a vessel, a warranty that she is sheathed.<sup>3</sup> Nor is the description of the risk "at and from New York to the port of Sisal" a warranty that there is any port at Sisal.<sup>4</sup> And the calling of the vessel in the policy "the good ship A" is no warranty of her sea-worthiness.<sup>5</sup> It has been held in Louisiana, in a case where a vessel had sustained an injury, and insurance was effected "on condition that the damage done (mentioning it) be repaired, and the vessel be put in as good order as she was previous to that accident," that her being repaired was not a condition precedent to the attaching of the policy, but meant that the insured should repair the vessel before she was exposed to the perils of the sea.<sup>6</sup> We must, however, express our doubts of the correctness of this decision. And if the recital of a fact could have no relation whatever to the risk, it would seem not to be a warranty, but merely a representation.<sup>7</sup> It has been held, that a non-

<sup>1</sup> *Le Mesurier v. Vaughan*, 6 East, 382.

<sup>2</sup> *Clapham v. Cologan*, 3 Campb. 382.

<sup>3</sup> *Martin v. Fishing Ins. Co.*, 20 Pick. 389.

<sup>4</sup> *De Longuemere v. N. Y. Firem. Ins. Co.*, 10 Johns. 120. And in *Muller v. Thompson*, 2 Campb. 610, where the insurance was declared to be "on the cargo, being 1,031 hogsheads of wine," it was held that this did not amount to a warranty that the whole cargo consisted of wine, but merely that the insurance should attach upon that part of the cargo which consisted of the 1,031 hogsheads of wine.

<sup>5</sup> *Small v. Gibson*, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 305.

<sup>6</sup> *Hyde v. Miss. M. & F. Ins. Co.*, 10 La. 543. While the vessel was being repaired, the river rose, accompanied by a storm, and the vessel sunk. The underwriters were held liable for a total loss.

<sup>7</sup> *Mackie v. Pleasants*, 2 Binn. 363.

The insurance in this case was effected on "the good British brig called The John." The vessel was insured at the regular sea-risk premium, and there was a written memorandum at the foot of the policy, that the insurance was to be against perils of the sea only, and was to end on capture. The vessel was not duly registered as a British brig, but there was evidence that her captain was a subject of Great Britain. It was also shown to be the custom in Philadelphia to insert all special warranties in a separate clause, and that this did not contain any warranty of nationality. It was held, on all these facts, that, the vessel having been lost by a peril of the sea, the plaintiff was entitled to recover. The fact that the nationality of the vessel was not stated in the usual warranty clause was considered as of great weight in determining the inten-

compliance with the exact requirement of a warranty, at the commencement of a risk, avoids the policy, although afterwards and before loss it is complied with, and all the other risks are wholly distinct from that to which the warranty related,<sup>1</sup> even if the breach is caused by one of the perils against which there is insurance.<sup>2</sup>

If the warranty is of a fact that is not to occur until after the commencement of the risk, and the loss occurs before the warranty is complied with, it is no breach which discharges the insurers;<sup>3</sup> nor is it such a breach if a compliance with the warranty was legal when it was made but becomes illegal afterwards; for the law never requires that an illegal act should be done.<sup>4</sup>

The usual subjects of express warranty are ownership of the property, its neutrality, and the lawfulness of the goods or adventure, the taking of convoy, and the time of sailing; and we will consider them in their order.

#### A. *Of the Warranty of Ownership.*

The insurers have, as has been said, the right of personal selection of the parties, although it was held that a warranty could be in any part of the policy.

<sup>1</sup> *Rich v. Parker*, 7 T. R. 705, 2 Esp. 615; *Goicoechea v. La. State Ins. Co.*, 18 Mart. La. 51.

<sup>2</sup> *Hore v. Whitmore*, 2 Cowp. 784. In 1 Phillips on Ins. § 770, the rule is otherwise stated, and *Havelock v. Hancill*, 3 T. R. 277, and *Cruikshank v. Jansen*, 2 Taunt. 301, are cited. But those cases, as explained by the courts deciding them, do not seem to conflict with the above case of *Hore v. Whitmore*, in which the doctrine laid down in the text is expressly sustained. See 1 Arnould on Ins. 584.

<sup>3</sup> *Hendricks v. Com. Ins. Co.*, 8 Johns. 1; *Taylor v. Lowell*, 3 Mass. 331, 347; *Baines v. Holland*, 10 Exch. 801, 32 Eng. L. & Eq. 503; 1 Phillips on Ins. § 771. Mr. Arnould questions this doc-

trine, and contends that it was competent for the parties to contract that the policy "should be void *in toto*, as well upon the non-performance of some promised act as upon the non-existence of some alleged event," and says it seems to him that they must be taken to have done so. But it is clear, that, if a total loss should happen before the time at which the warranty is to be complied with, the insurer would have no defence, even if he could show that the insured intended not to comply with it. This must have been in the contemplation of the parties, and seems to show that they could not have intended to make the contract void *ab initio* in case of a non-compliance with the warranty. See 1 Arnould on Ins. 583.

<sup>4</sup> *Brewster v. Kitchell*, 1 Salk. 198, 1 Ld. Raym. 317.

tion, as it is obvious that property would be far safer if owned and controlled by some persons than if owned by others. But, generally, if they wish to secure any advantage of this kind, there must be express warranty of the ownership; for, as we have seen, the owner need not be named; but, as we have also seen, the ownership cannot be changed by assignment or transfer, without the consent of the insurers.<sup>1</sup>

### B. *Of the Warranty of Neutrality.*

The most usual cause of requiring a warranty of ownership occurs where this is done in order to make it certain that the property is neutral, or at least to prevent the underwriters from assuming any risk arising from the belligerent character of the property. A warranty that the property is "English" or "French" means that it is owned by Englishmen or Frenchmen, and has the proper proof and evidence of such ownership.<sup>2</sup> To determine to what nation a person belongs, regard must be had to the question of domicile. Thus, as we have already seen, if an American is residing in England and engaged in trade there, he is as to that trade considered as an Englishman,<sup>3</sup> and if he insures goods, and warrants them to be American property, the underwriters are not liable for a loss by capture.<sup>4</sup> A colony partakes of the nationality of its parent country, so that the produce of an estate in a colony of a belligerent power, owned by a neutral, is considered as belligerent.<sup>5</sup> But it seems that if the property is once landed in a neutral country, or brought there in vessels, and then removed from those vessels to others in which it is to be exported, it is considered as neutral.<sup>6</sup> But if the importation is only colorable, and

<sup>1</sup> See *ante*, p. 59.

<sup>2</sup> *Baring v. Clagett*, 3 B. & P. 201; *Lewis v. Thatcher*, 15 Mass. 431.

<sup>3</sup> See *ante*, p. 26, n. 4.

<sup>4</sup> *Tabbs v. Bendelack*, 4 Esp. 108.

<sup>5</sup> *The Maastrom*, cited 5 Rob. Adm. 21; *The Juffrow Catharina*, cited *Ib.* 21; *The Phoenix*, *Ib.* 20.

<sup>6</sup> *Berens v. Rucker*, 1 W. Bl. 313. In *the Polly*, 2 Rob. Adm. 361, an American vessel was captured on a voyage from a port in Massachusetts to Spain, with a cargo consisting partly of

the produce of a Spanish colony. The goods had been imported from Havana in the same vessel, for the same owners, and had been landed in the United States, while the ship was being repaired, and duties paid on them. Sir *William Scott* held, that, although the landing of the goods and the payment of duties on them might not be universally the test of a *bona fide* importation, yet they were generally the criteria, and the restoration of the vessel was ordered.



the intention of the importer is to transship and export the goods, their original character remains.<sup>1</sup>

These questions have grown out of a rule of law which appears to be well established by the English courts, though it has never been recognized in this country, but on the contrary strongly repudiated, and which, it seems to us, is in direct conflict with every principle of the law of nations. This rule is, that a country which, during peace, confines the trade of its colonies to its own subjects, cannot, during war, open such trade to a neutral.<sup>2</sup>

<sup>1</sup> *The Essex*, cited 5 Rob. Adm. 369; *The William*, Ib. 385; *The Maria*, Ib. 365.

<sup>2</sup> This subject has been so elaborately discussed by the jurists of this country and England, that were we to attempt a full consideration of the question, we should only be able to repeat what has been before said, and we shall, therefore, confine ourselves to a brief statement of the origin of the rule, and the reasons which have been urged in its support, and against it. This rule is generally known by the name of the rule of 1756, because many vessels were then condemned for engaging in the colonial trade of France, but Mr. *Duer* contends that these cases were decided on a different ground from the subsequent authorities. See 1 *Duer*, Ins. 705. But the rule was acted on by Lord *Stowell*, as is stated in 1 *Arnould*, Ins. p. 629, from the year 1792 to 1815, and is firmly established in England. Mr. *Arnould* states that the rule rests on two grounds: "1. That the neutral, by thus acting, interposes to relieve the enemy from the condition to which the other belligerent had reduced him, and to that extent deprives that belligerent of the advantage he had gained; 2. That the neutral employed in a trade reserved by the enemy to his own subjects identifies himself with that enemy, and assumes his character." To these

reasons another has been added, — that, as the neutral nations are permitted to enjoy the whole of the trade to which they were entitled in time of peace, they can sustain no injury by their exclusion from that which is first opened to them in time of war. See 1 *Duer*, Ins. 706.

The objections to the rule are, that it is not founded on the law of nations, but is a most unwarrantable extension of the law of blockade, "at utter variance with the principle on which the law of blockade is certainly founded," — it being a well-settled principle of law that a neutral has a right to trade with a belligerent except in contraband goods, and to a blockaded port. The last reason for the rule is open to the objection that it has no foundation in point of fact. If a neutral had, in time of war, the same rights which he has in time of peace, there would be an apparent equity for the rule, but in time of war he is entirely cut off from all trade in contraband articles, and to blockaded ports. In support of the English rule, see *The Ebenezer*, 6 Rob. Adm. 250; *The Emmanuel*, 1 Ib. 296; *The Immanuel*, 2 Ib. 186, 200; *The Rebecca*, Ib. 101; *The Minerva*, 3 Ib. 229; *The Jonge Thomas*, Ib. 233, note; *The Charlotte*, 4 Ib. Appendix, p. 13; *The Welvaart*, 1 Ib. 122; *The Providentia*, 2 Ib. 142; *The Calypso*, Ib.

If the property is warranted to be of a certain country, at a time when that country is known to be at peace, this may be regarded as equivalent to a warranty of neutrality. And a warranty that the ship or the cargo is neutral, or neutral property, means, first, that it is actually owned by citizens of a country not at war when the risk begins; and, secondly, that with the property there shall go all those usual documents and precautions which prove the neutrality of the property and protect it from belligerent risks. But a declaration of war, made after the policy is made, although it may render the property belligerent, does not avoid the policy.<sup>1</sup>

If the neutral or national character of the property be not expressly warranted, but some fact is warranted, or so asserted as to amount to a warranty, and this fact, if true, would necessarily imply the neutrality of the property, then that neutrality is warranted.<sup>2</sup> It seems to be well settled that "whoever embarks his property in shares of a ship is bound by the character of that ship." If, therefore, a neutral owns part of a vessel, though it is purchased and held before the war, and the rest of the vessel is owned by belligerents, the whole vessel is subject to condemnation.<sup>3</sup> And it would, therefore, follow that a warranty of neutrality would be broken if a belligerent owned any part of the vessel.

154; *The Rosalie & Betty*, 4 Ib. Appendix A, p. 3, n.; *The Juliana*, 4 Ib. 328; *The Convenientia*, Ib. 201; *The Anna Catharine*, Ib. 107; *The Thomyris*, Edw. 17; Lord Liverpool's "Discourse on the conduct of the government of Great Britain," etc.; Ward "On the Rights and Duties of Belligerents and Neutrals"; Stephens's "War in Disguise."

The rule has been repudiated by the government of this country, on the ground that neutrals are entitled "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace." Mr. Monroe's letter to Lord Mulgrave, September 23, 1805, and Mr. Madison's letter to Messrs. Monroe & Pinckney,

May 17, 1806. See also the memorials of the merchants of Baltimore, New York, Boston, and Salem, 5 American State Papers, 330 - 355, 367 - 379. The Baltimore memorial was drawn by Mr. Pinckney. We must also call the attention of the reader to the learned and elaborate essay by Mr. Justice *Duer*, to which we are much indebted for a clear and accurate statement of the law on this subject. 1 *Duer*, Ins. 698 - 725.

<sup>1</sup> *Eden v. Parkison*, 2 Doug. 732; *Saloucci v. Johnson*, Park on Ins. 449, per *Buller*, J. See also *Tyson v. Gurney*, 3 T. R. 477.

<sup>2</sup> See *ante*, p. 339, and cases cited.

<sup>3</sup> *The Vrow Elizabeth*, 5 Rob. Adm. 2; *The Primus*, 1 Spink, Adm. 353, 29 Eng. L. & Eq. 589; *The Industrie*, 1 Spink, Adm. 444, 33 Eng. L. & Eq. 572.

In regard to goods, the rule is different,<sup>1</sup> and the warranty of neutrality is held to extend only to the interest of the assured, and is not broken by the fact that a part of the cargo not insured is not neutral.<sup>2</sup> But if the warranty is by an insured, whose interest covers the whole, the belligerent character of any part would render the whole liable to condemnation;<sup>3</sup> and so it would be if in an insurance of any part there were an express warranty that the whole cargo was neutral. The law looks at the equitable or beneficial interest in determining this question; and, therefore, property held by a neutral by a legal title, but in trust and for the benefit of a belligerent, is belligerent property.<sup>4</sup> And it has been held, that goods sold to a belligerent, and to be delivered to him in his own country, are belligerent during their transit;<sup>5</sup> but it would oppose the general principles of the law of contract, to give this character to the property if the sale were not completed and the property transferred so as to be at the risk of the belligerent, who had paid, or was bound, at all events, for the price.<sup>6</sup>

If neutral goods are shipped, in time of peace, to a consignee who has not ordered them, so that the property would not vest in

<sup>1</sup> *The Vreede Scholtys*, 5 Rob. Adm. 5, note; *The Primus*, *supra*.

<sup>2</sup> *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274; *Barker v. Blakes*, 9 East, 283.

<sup>3</sup> *Goold v. United Ins. Co.*, 2 Caines, 73; *Murray v. United Ins. Co.*, 2 Johns. Cas. 168; *Bayard v. Mass. F. & M. Ins. Co.*, 4 Mason, 256. In *Calbreath v. Gracy*, 1 Wash. C. C. 219, it was held, that, if property is warranted neutral and the insured is owner of one third, yet if he is joint owner with others of the whole, this is a warranty of the neutrality of the whole, but otherwise if the other persons have only a colorable interest.

<sup>4</sup> *Murray v. United Ins. Co.*, 2 Johns. Cas. 168. See also *The Abo*, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

<sup>5</sup> *The Atlas*, 8 Rob. Adm. 299; *The Sally*, cited 3 Ib. 300; *The Anna Catharina*, 4 Ib. 107; *The Jan Frederick*, 5

Ib. 127. See also *The Ann Green*, 1 Gallis. 274; *The Francis*, 1 Gallis. 445; 1 Kent, Com. 86; 1 Duer on Ins. 423 *et seq.*

<sup>6</sup> The principle laid down in the decisions cited in the preceding note was opposed with great force in *DeWolf v. N. Y. Firem. Ins. Co.*, 20 Johns. 214, 2 Cowen, 56. The objection, as stated by *Spencer, C. J.*, is substantially this: As the property in goods on their way to a belligerent to be delivered to him in his country does not pass under the contract of sale until the delivery, the principle of the above cases would expose all property bound to an enemy's country to capture and condemnation, and thus overthrow the general principle that trade between neutrals and belligerents, except in contraband goods, is lawful. See also *Ludlow v. Bowne*, 1 Johns. 1.

him till the goods were received, in case of capture they are considered as the property of the consignor.<sup>1</sup> But if they are shipped by a neutral after the war begins, and under a contract made during peace, but in contemplation of war, and to be at the risk of the sender until delivery, they are put on the same footing as if the contract were made during war.<sup>2</sup>

If a subject of a belligerent power ships goods to a neutral, which have not been ordered by him, so that the belligerent retains the control over them, they are considered as his property.<sup>3</sup> The general rule is, that belligerent property cannot change its character while *in transitu*,<sup>4</sup> so that, if by the agreement between the vendor and the vendee the goods were to become the property of the latter on the performance of a condition, it would seem that, although this was complied with before capture, it would not affect the rights of the captors to consider the goods as belligerent.<sup>5</sup>

The mere right of a belligerent seller to stop the goods *in transitu*, on the insolvency of the vendee, is not such an interest in him as would make the goods belligerent.<sup>6</sup>

<sup>1</sup> The Abo, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

<sup>2</sup> The Packet De Bilboa, 2 Rob. Adm. 138, 135, per Sir William Scott. "A distinction has, indeed, been admitted in favor of contracts made before a war and without any contemplation of it; but if the contract, being made before the war, and without any prospect thereto, is carried into execution by a shipment after the breaking out of hostilities, the ground on which that favorable distinction is made no longer exists." Per Sir William Scott, The Anna Catharina, 4 Rob. Adm. 107, 112.

<sup>3</sup> The Carolina, 1 Rob. Adm. 305; The Josephine, 4 Rob. Adm. 25; The Aurora, Ib. 218; The Frances, 8 Cranch, 359. In The Francis, 1 Gallis. 445, the shipment was to belong to the neutral at his election, in twenty-four hours after arrival. It was held that the property was to be considered as hostile.

<sup>4</sup> In The Negotie en Zeevaart, cited 1 Rob. Adm. 111, and in The Danckbaar Africaan, 1 Rob. Adm. 107, it was held, that, where property was hostile when shipped, it could not change its character while *in transitu*, although before capture the owners had become by capitulation subjects of the capturing power.

<sup>5</sup> In The Ship Francis, 1 Gallis. 445, the goods were to become the property of the consignee at his election in twenty-four hours after arrival. The claimants moved for further proof by which they could show that they had made their election before the capture. Mr. Justice Story refused to grant the order for further proof, mainly on the ground that it would constitute no legal defence, on the authority of the cases cited in the preceding note.

<sup>6</sup> See The Merrimack, 8 Cranch, 317. Some confusion has arisen from the twofold meaning of the words "stoppage in

A neutral shipper, becoming belligerent by subsequent war, cannot protect the goods by transfer to a neutral for that purpose.<sup>1</sup> And if a neutral transfers a part of the property to a belligerent, so that this part loses its neutral character, it is a breach of the warranty of neutrality as to the whole property.<sup>2</sup>

The general rule is, that if a neutral cargo is shipped on board a belligerent vessel before war is declared, the bill of lading need not state for whose account and risk the property was shipped; but the law is otherwise if it is put on board after war is declared.<sup>3</sup>

The bill of sale of the ship, the sea-letter, or customary certificate of nationality, the register of the vessel, the charter-party, shipping papers, and roll of equipage, the log-book, and generally all documents which usually state the national character, and especially the flag, must all conform to this warranted neutrality of the ship.<sup>4</sup> Upon this point the law goes so far as to hold that if

*transitu.*" The one is the right of the vendor, when he consigns goods to a party who has not ordered them, to take possession of them at any time, and the other is the right of the vendor to take the goods before the vendee obtains possession of them, although the sale is absolute in its terms, if the vendee has become insolvent. In the former case the character of the goods does not change till delivery, as we have already seen, while in the latter the property vests in the vendee, subject to the exercise of this right, which is, as we think, but an extension of his lien for the price, and does not act as a rescission of the contract.

<sup>1</sup> The *Vrow Margaretha*, 1 Rob. Adm. 336; The *Carl Walter*, 4 Ib. 207. So a contract made by a neutral, in anticipation of his becoming belligerent, to transfer property *in transitu*, if for the purpose of withdrawing it from capture, will not protect it. The *Jan Frederick*, 5 Rob. Adm. 127.

<sup>2</sup> *Goold v. United Ins. Co.*, 2 Caines, 73.

<sup>3</sup> The *Abo*, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

<sup>4</sup> No rule can be laid down as to the precise amount of evidence required. In *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, the want of a register was not in itself considered a breach of the warranty of neutrality, a sea-letter being held sufficient evidence of national character. The opinion of Lord *Alvanley* to the contrary, in *Baring v. Clagett*, 3 B. & P. 201, was founded on the idea that an unregistered vessel was not considered as an American vessel under the act of Congress of 1792. This decision was given in 1802, but subsequent legislation recognizes vessels owned wholly by citizens of the United States and furnished with sea-letters, as entitled to protection as American vessels. See *Griffith v. Ins. Co. of N. A.*, 5 Binn. 464; *Blagge v. N. Y. Ins. Co.*, 1 Caines, 549; *Coolidge v. N. Y. Firemen's Ins.*, 14 Johns. 308. The *San Jose Indiano*, 2 Gallis. 268, 285. The importance of having papers conform to the warranty of neutrality

the vessel exhibits only false papers when she is captured, this is a breach of the warranty of neutrality, though she have on board the proper American papers, and have a right to carry the false papers; because she must not only have proper papers, but use them in a proper time and in a proper way.<sup>1</sup> As to the goods, their neutral national character must be proved by the invoices and bills of lading, and by all certificates, letters, or other documents relating to the goods, which are in themselves proper, or are made so by usage.<sup>2</sup>

It seems that simulated or false papers may not only be carried when leave is expressly given, but when a usage exists to carry them, which is or should be known to the insurer.<sup>3</sup> But, in one

may be gathered from the following statement of the law by Sir *W. Scott*, in *The Success*, 1 Dods. 131, 132: "Now it is a known rule of law, that, when parties agree to take the flag and pass of another country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to claim the benefit of their real character. They are likewise subject to this further inconvenience, that their own real character may be pleaded against them by others." See the *Vigilantia*, 1 Rob. Adm. 1; *The Vrow Elizabeth*, 5 Rob. Adm. 2, and note; *The Vreede Scholtys*, 5 Rob. Adm. 5, note; *Higgins v. Livermore*, 14 Mass. 106; *Schwartz v. Ins. Co. of N. A.*, 3 Wash. C. C. 117. In a time of peace the registry seems to be sufficient to comply with the warranty of neutrality. *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594. Compliance with the law of nations is generally sufficient, and it is not necessary to observe an ordinance of a belligerent power, especially when it is not known to the neutral. *Siffken v. Lee*, 5 B. & P. 484. See also *Barzillay v. Lewis*, Park on Ins. 469. What is meant by a sea-letter may be shown by parol.

*Slegt v. Hartshorne*, 2 Johns. 531, overruling same case in Supreme Court, *Slegt v. Rhineland*, 1 Johns. 192.

<sup>1</sup> *Calbreath v. Gracy*, 1 Wash. C. C. 219.

<sup>2</sup> *Griffith v. Ins. Co. of N. A.*, 5 Binn. 464.

<sup>3</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, per *Marshall*, C. J.; *Calbreath v. Gracy*, 1 Wash. C. C. 219, per *Washington*, J. But generally the concealment of papers amounts to a breach of warranty. *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506. See *Oswell v. Vigne*, 15 East, 70; *Horney v. Lushington*, 15 East, 46; *Steel v. Lacy*, 3 Taunt. 285. In *Himey v. Stewart*, 1 Brev. 209, it was held, that, where goods insured are masked to avoid capture, the mask must be preserved, and if the master of the vessel in which they are laden has agreed with the insured to protect them by claiming them as his own, he is the agent of the insured for that purpose, and is bound to take every necessary measure and to use every precaution consistent with his duty to preserve the property, and if the goods are lost by his failure to do so, the insurer will not be liable; nor will he if the insured



case, the concealment of papers was declared to be a breach of the warranty, and the having on board papers written in sympathetic ink and thereby rendered suspicious, was held to be equivalent to a concealment of material papers.<sup>1</sup> If a party, in time of peace, for the sake of avoiding certain duties or the like, assumes a false character, he is not concluded by such assumption, in case of a war breaking out, from showing the true character and nature of the goods.<sup>2</sup>

As a general rule, it is a sufficient compliance with a warranty of neutrality, if the vessel is neutral according to the law of nations; and if she is captured and condemned for the breach of an ordinance of the capturing power, which was contrary to the law of nations and of which neither party had notice, the underwriters are liable.<sup>3</sup>

While a ship is forfeited by the master's disguising belligerent property on board as neutral, without the authority, assent, or knowledge of the owner, the forfeiture of neutrality by owner or master or both does not operate as a breach of neutrality as to goods on board which are actually neutral, and proved to be so by proper documents, and which belong to another owner than him who has forfeited his goods.<sup>4</sup>

sends papers by the same vessel the goods are in, which lead to a discovery of the contrivance, and enable the captors to unmask the property.

<sup>1</sup> *Carrere v. Union Ins. Co.*, 3 Harris & J. 324; *Schwartz v. Ins. Co. of N. A.*, 3 Wash. C. C. 117.

<sup>2</sup> *The Vreede Scholtys*, 5 Rob. Adm. 5, note.

<sup>3</sup> *Mayne v. Walter*, 3 Doug. 79.

<sup>4</sup> The mere fact of there being belligerent property on board a neutral vessel will not be a breach of the warranty of neutrality of the vessel. "But if the neutral endeavors, by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and the increase of risk by being carried in for adjudication is produced, not by a legal act, as in the former case; but by a fraud on the neutrality of his own government, and upon the rights of the belligerent. The warranty of neutrality is broken by unneutral conduct in the insured." *Schwartz v. Ins. Co. of N. A.*, 3 Wash. C. C. 117; *The Fortuna*, 3 Wheat. 236, 245. If the master, as general agent of a neutral cargo, belonging to him and other persons, covers belligerent property on board as neutral, this works a forfeiture of the property of his principals, although it is done without their knowledge, and although their property can plainly be distinguished from the covered property by the bills of lading and the invoices on board. *Phoenix Ins. Co v. Pratt*, 2 Binn. 808, reversing same case at *nisi prius*, *Pratt v. Phoenix Ins. Co.*, 1 Browne, 152.



As the warranty of neutrality of property requires actual neutral ownership, and proper proof of this, so it requires such trade, conduct, and course of transaction as shall be in conformity and adaptation to the warranty. And, therefore, if the neutral interests or property are undistinguishably mixed up with belligerent interests or property, they become liable themselves to all the incidents and effects of a belligerent character.<sup>1</sup>

So a resistance of a search when rightfully demanded,<sup>2</sup> an attempt at rescue,<sup>3</sup> seeking belligerent protection or receiving it,<sup>4</sup> are all breaches of the warranty of neutrality, because they belong to the conduct of a belligerent; but it is said, in qualification of this rule, that if any of these or similar things are done because a belligerent renders them necessary by his own illegal conduct, they are justifiable, and do not violate the warranty of neutrality.<sup>5</sup>

But it is evident that the character of the cargo on board belonging to other shippers would not be affected; for, even if the ship is belligerent, it may be shown that the cargo is neutral. See *ante*, p. 345, n. 1.

<sup>1</sup> *The Princessa*, 2 Rob. Adm. 49.

<sup>2</sup> *The Maria*, 1 Rob. Adm. 340, 360; *Garrels v. Kensington*, 8 T. R. 230; *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457, 468; *Brown v. Union Ins. Co.*, 5 Day, 1. See, contra, *Saloucci v. Johnson, Park, Ins.* 498. This right of search does not exist in time of peace. *The Mariana Flora*, 11 Wheat. 1.

<sup>3</sup> *Garrels v. Kensington*, 8 T. R. 230; *McLellan v. Maine F. & M. Ins. Co.*, 12 Mass. 246; *Robinson v. Jones*, 8 Mass. 536; *Brown v. Union Ins. Co.*, 5 Day, 1.

<sup>4</sup> As where she sails under a belligerent convoy, or one of her own nation. *The Maria*, 1 Rob. Adm. 340; *The Joseph*, 1 Gallis. 545, 548; *The Sampson*, cited 1 Rob. Adm. 346. In *The Julia*, 1 Gallis. 594, 8 Cranch, 181, it was held, that a license from the enemy, on board an American vessel on a voyage to a neutral port in alliance with

the enemy, would subject the vessel and cargo to confiscation as prize of war, if the terms of the license were such as to prove an intercourse with the enemy and a direct subserviency to his interests. And the court were also strongly inclined to the opinion that a license, without any such peculiar terms, would have the same effect. If, however, the belligerent, against whom such convoy is taken, puts the neutral in a state of outlawry without just cause, as where a decree of the French Emperor made every ship which had been visited by an English liable to capture, then convoy may be taken. *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457. The following illustration is given by the court: "Suppose France had declared war against the United States after the commencement of the voyage, might not the captain have put himself under British convoy without breach of the warranty?"

<sup>5</sup> *McLellan v. Maine Fire and Mar. Ins. Co.*, 12 Mass. 246. See also *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457, note, *supra*.

If the captors do not put on board persons competent to navigate the vessel into port for adjudication, her own master and crew are not bound to do this. And if the vessel is given up to them, and they pursue their original course against the wish of the captors, this is not a rescue.<sup>1</sup> But if the neutral crew undertake and promise to navigate the vessel to the destined port for adjudication, and the vessel is given up to them for this purpose, and they violate their promise and take the vessel into their own hands for their own purposes and benefit, this is an unlawful rescue.<sup>2</sup>

Any acts in respect to neutral property, which have for their purpose the preventing of a belligerent from exercising the right he has over neutral property as such, generally give to the belligerent whom it is endeavored thus to obstruct or deceive the right of treating the property as belligerent; even to the extent of condemning the property, whether ship or cargo, mixed up with it and implicated in the same wrongful purpose.<sup>3</sup>

It is to be noticed, however, that the ship and the cargo are so far distinct, that neutral goods may be put on board a belligerent ship without being liable to be made prize of war; and that, if the ship be neutral, it is no breach of the warranty of her neutrality, that she takes on board and carries belligerent goods.<sup>4</sup>

The law of nations in respect to neutral property is controlled to a considerable extent by treaties between different countries, and it would seem that the terms and provisions of the treaties must be strictly complied with.<sup>5</sup>

<sup>1</sup> The *Pennsylvania*, 1 Act. 33.

<sup>2</sup> *Wilcocks v. Union Ins. Co.*, 2 Binn. 574.

<sup>3</sup> *The Eliza & Katy*, 6 Rob. Adm. 185; *The Fanny*, 1 Dods. 443; *Blagge v. New York Ins. Co.*, 1 Caines, 549.

<sup>4</sup> *Barker v. Blakes*, 9 East, 283. In the case of *The Nereide*, 9 Cranch, 388. *Marshall*, C. J., said: "The rule that the goods of an enemy found in a vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. . . . In the practical application of this princi-

ple, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found."

This question has been materially affected by late treaties made with reference to the war of the allies, England, France, and Turkey, against Russia.

<sup>5</sup> The treaty of 1778, between France and the United States, provided, that, "in case either of the par-

Another division of this question of neutrality is that of blockade. The questions in respect to this subject belong rather to International Law or the Law of Prize, and we do not consider it necessary to discuss them here; merely adding some additional rules which have been the subject of adjudication. It has been held, that, if notice of a blockade has been formally made to a foreign government, no individual of that nation will be allowed to aver ignorance of it as against the blockading power.<sup>1</sup> But as between the parties to the contract of insurance, it is always a question of fact, whether there was actual notice or knowledge.<sup>2</sup>

If the blockading squadron is driven off by a storm or a change of wind, the presumption is that there is an intention to return, and there is therefore no discontinuance of the blockade.<sup>3</sup> But

ties should be engaged in war, the ships and vessels belonging to the people of the other ally must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship." Under this clause it has been held that a passport to G. D., master or commander of the ship called *The Mount Vernon*, of the town of Philadelphia, of the burden of 424 27-95 tons, being at present in the port of Philadelphia," etc., was not sufficient, because the place of habitation of the master was not set forth, the words "of the town of Philadelphia" being held to apply to the ship and not to the master. *Baring v. Christie*, 5 East, 398; *Baring v. Clagett*, 3 B. & P. 201.

<sup>1</sup> See *The Neptunus*, 2 Rob. Adm. 110.

<sup>2</sup> In *Harratt v. Wise*, 9 B. & C. 712, Lord Tenterden, C. J., said: "Although the blockading nation may, by the law of nations, be allowed to consider its notification of a blockade as notice thereof to all the subjects of the nation to which the notification has been made, — for it cannot be expected that

the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country,—yet such a rule, allowing it to prevail to the supposed extent (though it appears probably to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce), cannot, in our opinion, be applied to the case of insurance. And, if the possibility, or even probability, of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We therefore think that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury." See also *Naylor v. Taylor*, 9 B. & C. 718; *Medeiros v. Hill*, 8 Bing. 231.

<sup>3</sup> *The Neptunus*, 1 Rob. Adm. 170, 171; *The Frederick Molke*, Ib. 86; *The Columbia*, Ib. 154, 156; *The Juffrow Maria Schroeder*, 3 Rob. Adm. 147; *Radcliff v. United Ins. Co.*, 7 Johns. 38, 54.

this presumption does not exist when the squadron is driven off by a superior force ; but notice must be given of the recommencement of the blockade, either by public declaration or by the notoriety of the fact.<sup>1</sup> The blockade must be strictly observed on the part of the blockading force. If, therefore, they permit some vessels to pass the line of blockade and enter the port, other ships may presume the blockade to be raised, and attempt to enter without leave.<sup>2</sup> And a relaxation of a blockade in favor of belligerents, to the exclusion of neutrals, is illegal.<sup>3</sup> If permission to enter is obtained from the commander of the blockading force through fraud or falsehood, it is certainly of no validity ; but if permission is given, upon a *bona fide* statement of all the facts in the case, it would clearly seem that the vessel could not afterwards be arrested.<sup>4</sup> And it has been held that if a vessel sails for a blockaded port, and is informed on the way by a vessel of the blockading power, though it does not belong to the blockading fleet, that the port is open, the master may proceed on his course.<sup>5</sup>

It has been said that in some instances "licenses are to be favorably regarded, and that it imports the good faith and honor of the government which grants them not to press the letter too rigorously." <sup>6</sup>

<sup>1</sup> The Triheten, 6 Rob. Adm. 65 ; The Hoffnung, 6 Rob. Adm. 112.

<sup>2</sup> The Rolla, 6 Rob. Adm. 364, 372. In Oldden v. M'Chesney, 5 S. & R. 71, the court said : " There is no necessity for perfect uniformity in maintaining a blockade, because there may be particular reasons for permitting particular vessels to go in or out. But the blockade should be preserved in so steady a manner as not to give neutrals just cause for supposing that it is raised. This they must suppose if ships are capriciously permitted to enter or depart. The neutral certainly goes upon ticklish ground, who ventures to depart, while any of the belligerent ships are in the neighborhood. All that can be said of the law is, that a neutral ship ought not to be condemned for breach of blockade, if other ships under the same cir-

cumstances have been permitted to depart."

<sup>3</sup> Northcote v. Douglas, 10 Moore, P. C. 37.

<sup>4</sup> Oldden v. M'Chesney, 5 S. & R. 71. Some doubt is expressed in this case whether such a right would exist if it were manifest "that the commander acted in violation of an order of his sovereign, which had been made known to the world."

<sup>5</sup> The Neptunus, 2 Rob. Adm. 110.

<sup>6</sup> The Juno, 2 Rob. Adm. 116. In this case the vessel sailed for Amsterdam, not knowing that the port was blockaded. The master, when he found it out, petitioned for leave to export to the Vlie, Embden, or Rotterdam ; and permission was given him to go to the ports of the Vlie, Embden, Rotterdam, or elsewhere. It was held that he might

A distinction exists between the liability of the cargo and of the ship to condemnation for a breach of a blockade. *Prima facie* the cargo is considered as liable to condemnation, if any breach has been made which subjects the ship to condemnation.<sup>1</sup> But the cargo is not liable to condemnation if it is the property of a person other than the owner of the ship, and its owner was not cognizant of the intended violation.<sup>2</sup> If, however, the owners of the cargo gave the master discretionary power, they are liable for his acts;<sup>3</sup> or if the cargo was loaded after notification of the blockade, — the parties having full knowledge of the fact.<sup>4</sup> And so they are, *a fortiori*, if they are also owners of the ship.<sup>5</sup>

A blockade may be broken by egress as well as by ingress.<sup>6</sup> No notice of a blockade, after it has existed *de facto* for any length of time, is necessary to be made to vessels confined in the port, "the continued fact being of itself sufficient notice."<sup>7</sup> A vessel may leave a blockaded port in ballast,<sup>8</sup> or with a cargo placed on board before the declaration of the blockade.<sup>9</sup> But if placed on board afterwards, both vessel and cargo are condemned, provided the cargo belongs to the owner of the ship, or its owner was cognizant of the act of the captain.<sup>10</sup> And this right to leave a port with a cargo laden on board before the declaration of the blockade is to be construed strictly, and does not exist unless the cargo was actually on board, or in lighters for the purpose of being conveyed

go to Amsterdam through the Texel as well as through the Vlie passage. And although the license said nothing about coming out again, yet it was held that this was a benefit incidental to the license, and inseparable from it. And under all the circumstances of the case, the master having taken a return cargo and sailed openly and *bona fide*, it was held that if he was wrong he acted under a misapprehension that the blockade as to him was entirely relaxed, and that his vessel therefore was not liable to condemnation.

<sup>1</sup> The Neptunus, 3 Rob. Adm. 173.

<sup>2</sup> The Mercurius, 1 Rob. Adm. 80; The Exchange, Edw. Adm. 39, 43; The Adelaide, 3 Rob. Adm. 281.

<sup>3</sup> The Columbia, 1 Rob. Adm. 154.

<sup>4</sup> The Adonis, 5 Rob. Adm. 256.

<sup>5</sup> The Mentor, 1 Act. 60.

<sup>6</sup> Tottie v. Heathcote, 10 Moore, P. C. 70.

<sup>7</sup> The Vrouw Judith, 1 Rob. Adm. 150.

<sup>8</sup> The Potsdam, 4 Rob. Adm. 89; The Juno, 2 Rob. Adm. 116, 119. But a ship cannot enter a port in ballast, even if the purpose be to bring away a cargo purchased previously to the blockade. The Comet, Edw. Adm. 32.

<sup>9</sup> Olivera v. Union Ins. Co., 3 Wheat. 183; The Vrouw Judith, 1 Rob. Adm. 150.

<sup>10</sup> The Frederick Molke, 1 Rob. Adm. 86.

to the ship, although it may have been purchased and warehoused previously to the notification.<sup>1</sup>

If the cargo has been sent in previously to the blockade, it may be withdrawn by the owner.<sup>2</sup> And the minister of a neutral country may charter a vessel to send home distressed seamen of his country; but if a cargo is taken in the vessel, both it and the vessel are liable to condemnation.<sup>3</sup> So it is a breach of the blockade, if a vessel, after the blockade is notified, continues to embark cargo.<sup>4</sup> And if a master voluntarily enters a blockaded port and is there compelled to sell his cargo, this is no excuse for the breach of the blockade.<sup>5</sup> And it is a breach if he there purchases an enemy's vessel.<sup>6</sup> An exception to this rule is made where the vessel was originally the property of the purchaser, in which case the transaction is considered as a ransom or compromise.<sup>7</sup> Nor does the rule apply to the case of a vessel purchased of one neutral by another.<sup>8</sup>

If a vessel escapes from a blockaded port, she may be captured in any part of her voyage.<sup>9</sup> And where a vessel sailed from a blockaded port in France for New Orleans, it was held that the voyage was not so terminated, by her being driven into a port of Great Britain, as to prevent her being seized there.<sup>10</sup> If a place is not invested by land as well as by sea, it has been held that if goods are taken from it by land, or in any other way which is not blockaded, and then shipped, they are not liable to be seized.<sup>11</sup>

<sup>1</sup> *Oldden v. M'Chesney*, 5 S. & R. 71. In *The Rolla*, 6 Rob. Adm. 364, 371, it was argued that the rule did not apply to a cargo consisting of hides and tallow, and other articles, of which, in warm climates, it would be necessary to defer the shipment till the last moment, and that a possession in warehouses should be taken as equivalent to the possession by shipment; but Sir *William Scott* said: "I do not feel that there is any just call upon me to distinguish in their favor, or to depart in this particular case from those rules which the court has felt itself under the necessity of laying down, to prevent the continual danger of being imposed on by particular evidence, if I was to permit

the exemption to be carried further than to a delivery on board the ship, or in lighters."

<sup>2</sup> *The Juffrow Maria Shroeder*, cited 4 Rob. Adm. 89.

<sup>3</sup> *The Rose in Bloom*, 1 Dods. 57, 58.

<sup>4</sup> *The Calypso*, 2 Rob. Adm. 298.

<sup>5</sup> *The Byfield*, Edw. Adm. 188.

<sup>6</sup> *The General Hamilton*, 6 Rob. Adm. 61; *The Vigilantia*, 6 Rob. Adm. 122.

<sup>7</sup> *The Rose in Bloom*, 1 Dods. 57.

<sup>8</sup> *The Vigilantia*, 6 Rob. Adm. 122.

<sup>9</sup> *The Welvaart Van Pillaw*, 2 Rob. Adm. 128.

<sup>10</sup> *The General Hamilton*, 6 Rob. Adm. 61.

<sup>11</sup> *The Ocean*, 3 Rob. Adm. 297;



### C. *Of the Warranty of Convoy.*

The clause containing the warranty to sail with convoy, which is common in English policies in time of war, is seldom, if ever, employed in this country.<sup>1</sup> It may, however, be well to state briefly some of the leading English decisions upon this subject.

As a general rule the convoy must be for the whole voyage;<sup>2</sup> but as the entire system of convoys is under the direction and control of government, it follows that the warranty is complied with by joining a convoy, however small it may be,<sup>3</sup> even if it is not going to the port of destination of the vessel insured; but the latter will have to join another convoy<sup>4</sup> or even to proceed alone,<sup>5</sup> if vessels to that port are so directed by the government. If a general rendezvous is appointed, the vessel may sail for that place without convoy,<sup>6</sup> although there is a convoy for ships bound for other destinations between the port of loading and the place of rendezvous.<sup>7</sup> But if the convoy is gone when the vessel arrives, she cannot endeavor to overtake it;<sup>8</sup> nor is it sufficient to sail under the protection of a single man-of-war which does not belong

The *Stert*, 4 Ib. 65. And goods may be sent to a blockaded port in the same indirect way. The *Jonge Pieter*, 4 Rob. Adm. 79.

<sup>1</sup> In England this subject has been to some extent provided for by statute. See 13 Car. 2, stat. 1, c. 9, § 13; 22 Geo. 2, c. 33, § 17; 38 Geo. 3, c. 76; 43 Geo. 3, c. 57. For decisions under these statutes, see *Cohen v. Hinckley*, 1 Taunt. 249; *Henderson v. Hinde*, Ib. 250, note; *Hinckley v. Walton*, 3 Ib. 131; *Long v. Duff*, 2 B. & P. 209; *Carstairs v. Allnutt*, 3 Campb. 497; *Metcalf v. Parry*, 4 Campb. 123.

<sup>2</sup> *Lilly v. Ewer*, 1 Doug. 72; *Jeffery v. Legender*, 3 Lev. 320.

<sup>3</sup> *Manning v. Gist*, 3 Doug. 74. The commander of the convoy in this case sent a single man-of-war to bring vessels to a certain place to join the rest of the convoy, and it was held, that the war-

ranty was complied with by sailing with this vessel.

<sup>4</sup> *De Garay v. Clagget, Park, Ins.* 455. See also *Smith v. Bradshaw*, per Lord *Mansfield*, C. J., *Park, Ins.* 454.

<sup>5</sup> In *D'Eguino v. Bewicke*, 2 H. Bl. 551, the vessel was going to St. Sebastian, and the convoy only went to Bilboa. It was held, that, as neither party could know the instructions of government, it was a sufficient compliance with the warranty if the assured took the convoy provided.

<sup>6</sup> *Lethulier's Case*, 2 Salk. 443; *Bond v. Gonsales*, 2 Salk. 445; *Gordon v. Morley*, 2 Stra. 1265; *Campbell v. Bordieu*, Ib.; *Hinckley v. Walton*, 3 Taunt. 131, 136, per Lord *Mansfield*, C. J.

<sup>7</sup> *Warwick v. Scott*, 4 Campb. 62.

<sup>8</sup> *Cohen v. Hinckley*, 1 Taunt. 249. See also *Gale v. Machell, Park. Ins.* 529, 2 Marsh. Ins. 659.



to the convoy;<sup>1</sup> nor with a convoy appointed for another voyage, though it may be bound upon the same course for the greater part of the way.<sup>2</sup>

It is generally necessary to obtain sailing orders, because without them the captain cannot answer signals, or know the place of rendezvous in case of a storm, and he does not in effect put himself under the protection of the convoy.<sup>3</sup> But the obtaining of the orders does not seem to be in the nature of a condition precedent, for if the commander of the convoy refuses to give them,<sup>4</sup> or they cannot be obtained on account of the weather, the vessel may sail without them.<sup>5</sup>

If a vessel neglects to obey sailing orders in starting, this is a breach of the warranty.<sup>6</sup> Not only must a vessel sail with the convoy, but it would seem that she must start as soon as possible; and if she delays, and is lost in consequence thereof, the underwriters are exonerated, although some of the vessels started after she did.<sup>7</sup> If the fleet is dispersed by a storm, the vessel insured may run immediately for her port of destination.<sup>8</sup> So, if she is driven back to the port of clearance, she may sail again without waiting for a convoy from that port, or joining one at another port.<sup>9</sup> And it has been held, that if, after the vessel has once joined the convoy, she is separated and lost, the underwriters are liable unless the separation was caused by the wilful fault of the master.<sup>10</sup>

#### D. *Of the Warranty of the Time of Sailing.*

Another express warranty of frequent occurrence is that which

<sup>1</sup> *Hibbert v. Pigou*, Park, Ins. 443. The vessel in this case sailed with a single ship of war, joined the convoy, and was subsequently lost. It was held, that, as she had not sailed with convoy in the first instance, the underwriters were not liable.

<sup>2</sup> *Cohen v. Hinckley*, 1 Taunt. 249.

<sup>3</sup> *Webb v. Thompson*, 1 B. & P. 5; *Anderson v. Pitcher*, 3 Esp. 124, 2 B. & P. 164. See also *Hibbert v. Pigou*, Park, Ins. 443, where this question was discussed, but not decided.

<sup>4</sup> *Veedon v. Wilmot*, Park, Ins. 444, note.

<sup>5</sup> *Victorin v. Cleeve*, 2 Stra. 1250.

<sup>6</sup> *Taylor v. Woodness*, Park, Ins. 454.

<sup>7</sup> *Waltham v. Thompson*, 1 Marsh. Ins. 376.

<sup>8</sup> *Audley v. Duff*, 2 B. & P. 111. See also *Manning v. Gist*, 3 Doug. 74.

<sup>9</sup> *Laing v. Glover*, 5 Taunt. 49. This case was, however, decided under the provisions of the statute of 43 Geo. 3, ch. 57. See *contra*, *Morrice v. Dillon*, 2 Selw. N. P. (11th ed.) 1005.

<sup>10</sup> *Jeffries v. Legandra*, 2 Salk. 443.

relates to the time of the ship's sailing.<sup>1</sup> As to this it is now quite clear that a ship sails when she weighs anchor or casts off her fastenings and gets under way, if the intention be to proceed at once to sea, without further delay.<sup>2</sup> If she moves with the intention of prosecuting her voyage, that is sufficient.<sup>3</sup> But if not entirely ready

<sup>1</sup> In *Baines v. Holland*, 10 Exch. 801, 32 Eng. L. & Eq. 503, the vessel was insured at and from New York to Quebec, during her stay there, and thence to the United Kingdom; the said ship being warranted to sail from Quebec on or before the 1st of November, 1853. The vessel was lost on the voyage from New York to Quebec. It was set up in defence, that on the 1st of November the vessel was at sea on her voyage from New York to Quebec, that the loss did not take place till after the 1st, and that the vessel did not sail from New York in time to enable her to complete the voyage to Quebec, and comply with the warranty of sailing from that port on or before the 1st. On demurrer it was held that the warranty was to be construed as an undertaking to sail from Quebec on or before the 1st, if the vessel arrived there by that time. *Parke, B.*, said: "The most natural construction is, that, so far as relates to the voyage from New York to Quebec, the policy is altogether without limitation as to time; but, as regards the voyage from Quebec to the United Kingdom, the underwriters are not responsible unless the vessel sails from Quebec on or before the 1st of November, 1853." In *Colledge v. Harty*, 6 Exch. 205, 3 Eng. L. & Eq. 550, the policy was made subject to certain rules, one of which was that vessels were not to sail "from any port on the east coast of Great Britain between the 5th of October and the 5th of April to any port or place in the Baltic . . . or to any port or place in the Belts between the 20th of Decem-

ber and the 15th of February." On the 8th of February the plaintiff's vessel sailed from Newcastle upon Tyne for a port in the Belts. It was held that the rule was a warranty, and that "to" meant towards, and that the defendant, therefore, was not liable.

<sup>2</sup> The ship must be actually moving on her voyage; hence, in a case where there were two anchors out, and one was raised on the day on which she was warranted to sail, and the captain was prevented from raising the other by a heavy swell, it was held not to be a compliance with the warranty, although the ship lay overnight with only one anchor, and got under way the next morning without having had communication with the shore. *Nelson v. Salvador, Moody & M.* 309, *Danson & L.* 219.

<sup>3</sup> In *Cochran v. Fisher*, 4 Tyrw. 424, 2 Crompt. & M. 581, the ship was lying in a dock at Dublin, warranted not to sail after August 15. On that day she cleared at the custom-house, and was ready for sea; but, as the wind blew directly up the river so that it was impossible to sail, she was warped down the river about half a mile. It was impossible for her to get out of the harbor on that day, and she did not leave till the 17th. *Lord Lyndhurst, C. B.*, said: "The question turns entirely on the intention of the captain; if, at the time of breaking ground and moving the vessel, he proceeded down the river with a *bona fide* intention of placing her in a more favorable position from which to prosecute the voyage, that would be

for sea, she has not sailed by merely moving down the harbor.<sup>1</sup> If she moves, ready and intended for sea, but is afterwards accident-

a compliance with the warranty; but if, as there is some reason to apprehend, he left the dock and warped his vessel down to the place at which she took ground, with no other object than merely and solely to comply with the letter of the warranty, that would not be such a sufficient commencement of the voyage as would be a compliance with the warranty." *Alderson, B.*, held it to be sufficient if the vessel was moved for mixed purposes. On a new trial the jury found that the master and crew intended to put the vessel in a more favorable situation for prosecuting the voyage, and not merely and solely to fulfil the warranty; but that at the time when the vessel quitted the dock he knew it was impossible to get to sea that day. The court then held on this finding that there had been a compliance with the warranty. *Fisher v. Cochran*, 5 Tyrw. 496, 1 Crompt. M. & R. 809. See also *Bowen v. Hope Ins. Co.*, 20 Pick. 275; *Union Ins. Co. v. Tysen*, 3 Hill, 118.

In *Bond v. Nutt*, Cowp. 601, the insurance was at and from Jamaica, warranted to have sailed on or before the 1st of August, 1776. The ship, before that time, sailed from St. Anne's to Bluefields, the general rendezvous for convoy at the Jamaica station, expecting to join convoy there and sail immediately for England. When she arrived at Bluefields, she was detained beyond the time by an embargo. The question was whether the warranty with regard to the time of sailing was complied with. Lord *Mansfield* said: "The question, then, is a matter of fact, and one that admits of no latitude, no equity of construction, or excuse. Had she or had

she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is that she had not sailed, though she stayed behind for the best reasons, the policy was void; the contingency had not happened; and the party interested had a right to say there was no contract between them. Therefore, what Mr. Wallace said in the argument is very true. If she had been prevented by any accident from sailing until the 2d of August, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port, the captain would have done very right not to sail, but there would have been an end of the policy. . . . The great distinction is this: that she sailed from St. Anne's to London by the way of Bluefields; and that it was not a voyage from St. Anne's to Bluefields, with any other object or view distinct from the voyage to England. If she had gone first to Bluefields for any purpose independent of her voyage to England, to have taken in water or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields, and another from Bluefields to London."

See also *Earle v. Harris*, 1 Doug. 357; *Wright v. Shiffner*, 2 Campb. 247, 11 East, 515; *Lang v. Anderdon*, 3 B. & C. 495, 5 Dowl. & R. 393, 1 Car. & P. 171; and cases in the next note.

<sup>1</sup> *Pettegrew v. Pringle*, 3 B. & Ad. 514; *Lang v. Anderdon*, 3 B. & C. 495, 499; *Graham v. Barras*, 3 Nev. & M. 125, 5 B. & Ad. 1011; *Ridsdale v. Newnham*, 4 Campb. 111, 3 M. & S. 456. In *Pettegrew v. Pringle*, 3 B. &

ally and compulsorily delayed, this is a sailing.<sup>1</sup> But if, when ready and intending to sail, she is stopped by a storm or some

Ad. 514, the ship was warranted not to sail from ports in Ireland after the 1st of September. The ship dropped down the river from the port of Sligo before that time, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river which the ship could not cross with the full quantity on board. Boats were waiting outside on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port, without taking the rest of his ballast, and this was not done till the 4th. Held, that the ship's dropping down the river and crossing the bar, without full ballast, was not sailing. Lord *Tenterden*, C. J., said: "The general principle of the decisions is this; that if a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise, if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage." In *Thompson v. Gillespy*, 5 Ellis & B. 209, 32 Eng. L. & Eq. 153, the question arose whether the vessel had sailed from Sunderland for Constantinople pursuant to a charter-party. She had left the harbor with an incomplete crew, the master and mate were not on board, the shrouds and cables had not been put in proper condition for the voyage, and the bills of lading were not signed. The ship left the harbor with the intention of anchoring in the roadstead till every-

thing was ready for the voyage. Held that this was not a sailing. See also *Hudson v. Bilton*, 6 Ellis & B. 565, 36 Eng. L. & Eq. 248; *Sharp v. Gibbs*, 1 H. & N. 801, 40 Eng. L. & Eq. 383. In *Williams v. Marshall*, 6 Taunt. 390, 2 Marsh. 92, 1 J. B. Moore, 168, 7 Taunt. 468, the vessel was licensed to export goods from the port of London before the 10th of the month. The vessel cleared on the 9th at the London custom-house, and arrived at Gravesend on the 12th. There the master is required to deliver certain papers, and he then receives the cockets and the clearing-notes. When any drawback is to be repaid to the master on exportation, he cannot entitle himself to it without producing this clearing-note. *Gibbs*, C. J., in 6 Taunt. 390, said: "Whether she was covered by this license, or not, depends on the question whether she sailed on the 10th. I cannot say, however I may be disposed to favor the plaintiffs, that the clearing at the custom-house is an exportation. Considerable light is thrown on the question by the fact, that by the regulations, or at least by the practice, of this country, the drawback is not paid till after the passing Gravesend; and therefore, upon the interpretation which has prevailed, of those acts of Parliament which give a drawback, it appears that ships are not considered as having exported till after passing Gravesend; therefore, with every disposition to favor this action, we cannot say that the plaintiffs are entitled to recover."

<sup>1</sup> *Thellusson v. Fergusson*, 1 Doug. 361; *Thellusson v. Staples*, 1 Doug. 366, note; *Earle v. Harris*, 1 Doug. 357. See also the two preceding notes.

similar obstruction *ab extra* before she gets under way, it may not be easy to reconcile the authorities. But the reasons given in some of the cases might lead to the conclusion, that, if the policy is not to attach until the vessel sails, it does not attach until an actual sailing, however that may be prevented. But if the policy has previously attached while the ship is in port, and the fact of her sailing or leaving the port on a certain day is a distinct warranty, and she is ready and intending to sail on that day, and is prevented by an accident or obstruction *ab extra*, it has been held that there is no breach of the warranty. But this may perhaps be doubtful.<sup>1</sup>

If the warranty be to sail from a place, a coast, or an island, on or before a certain day, the warranty is not complied with by sailing from it to return immediately to it, or from one port in the coast or island to another, but there must be an absolute setting sail with an intent to go finally away from it.<sup>2</sup> It has been held, but, as we think, on insufficient reasons, that a warranty "to depart" means more than a warranty "to sail"; and if a vessel unmoors and gets under way, and is prevented by stress of weather from getting clear of the harbor, this would be no breach of a warranty "to sail," but is one of a warranty "to depart."<sup>3</sup>

<sup>1</sup> *Hore v. Whitmore*, Cowp. 784; *Bond v. Nutt*, Cowp. 601, and cases cited in the three preceding notes. In *Hore v. Whitmore*, the insurance was at and from Jamaica to London, warranted to sail before 26th July, 1776, and free from all restraints and detainments of kings, princes, etc. The ship was ready to sail before the time, but was detained by an embargo. It was contended that the embargo being expressly insured against excused the delay. But, on the other hand, it was said, that "the warranty was positive and express, that the ship should depart on or before the day appointed, and therefore must be complied with. And of this opinion was the court."

<sup>2</sup> See *Wright v. Shiffner*, 11 East, 515; *Cruikshank v. Janson*, 2 Taunt. 301; *Ridedale v. Newnham*, 3 M. & S.

456; *Dennis v. Ludlow*, 2 Caines, 111. In *Lang v. Anderdon*, 3 B. & C. 495; the counsel argued that a different construction should be put upon the words "sail from" from that put upon the word "sail." The court did not reject the distinction, but held that it was not necessary for the decision of that case, and it appears never to have been since adopted by the courts. If insurance is effected on a vessel at A, with liberty to touch at B, warranted to sail after a certain day, the warranty applies to the sailing from A, and the vessel must leave that port after the day named. *Veizan v. Grant*, Park on Ins. 430.

<sup>3</sup> *Moir v. Royal Exchange Ass. Co.*, 3 M. & S. 461, 6 Taunt. 241, 1 Marsh. 576, 4 Camp. 84. In this case some stress seems to have been laid upon the fact that the use of the word "depart"

And the terms "final sailing,"<sup>1</sup> or being "despatched from" a in the policy was a deviation from the usual practice, which was to use the word "sail."

In *Van Baggen v. Baines*, 9 Exch. 523, 25 Eng. L. & Eq. 530, a question arose as to the meaning of the following provision in a charter-party: "Sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March." It was in evidence that Amsterdam was an inland port, and that vessels sailing from it had to pass through a canal about sixty miles in length to the port of departure called Nieuve Diep. Between these places vessels are towed by horses, and frequently take in their ballast at one of the villages on the route, though it may be taken in at Amsterdam. The vessel sailed from Amsterdam on the 31st of March with part of her ballast on board. The rest was taken in at a village on the canal, and the vessel did not sail from thence till the 3d of April. It was held that the charter-party was complied with. *Parke, B.*, said: "In *Moir v. Royal Exch. Ass. Co.*, the word 'depart' was held to mean something more than 'sail,' but that depended on the language of the policy. Cases have been cited as to the meaning of the word 'sail,' but they have no application to this case, because here there is no warranty as to sailing from Amsterdam. The whole question turns upon the meaning of the word 'leave,' and not on the words 'sail and proceed.'"

<sup>1</sup> This is shown by the case of *Roelands v. Harrison*, 9 Exch. 444, 25 Eng. L. & Eq. 470. The vessel was in a dock at Cardiff, ready for sea, and had her clearances from the custom-house. There was communication from the dock to the sea at high-water by means of

dock gates, but from these down to the low-water-mark there was a ship channel, where vessels were towed by steam-tugs, and were liable to be stopped by the harbor-master. The vessel proceeded from the dock gates along the ship canal, and then took the ground, and afterwards was carried back to the dock gates, where she grounded and was finally lost. By the charter-party three fourths of the freight was payable on the final sailing of the vessel from her port of loading, and the question arose whether it was due under the circumstances of this case. *Parke, B.*, said: "The question is, whether that period of time had arrived at which three fourths of the freight was to be paid. If it had been three fourths to be paid at the time of sailing of the vessel from the port of lading simply, then, according to several cases on the insurance law, the sailing is determined to be that period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave, by having the custom-house clearances on board. If that had been the criterion in this case, we think the vessel might possibly be considered as having broken ground; but that is a point of some doubt. Certainly, she was fit for sea in every other respect, and probably a warranty to sail by a given time would have been complied with; but we all think, upon reading this charter-party, that something more is meant than the sailing of the vessel, because they use the term 'the final sailing of the vessel,' and we are not at liberty to reject that term, and we must consider that it is adopted with reference to the particular port of Cardiff where the



place,<sup>1</sup> mean something more than is expressed by the word "sailing."

### E. *Of Particular Warranties and Stipulations.*

A great variety of warranties and stipulations have been occasionally introduced into policies of insurance, and much litigation has grown out of them. The warranty of the condition of the vessel usually refers to her crew, or her furniture or equipments, or her armament; but all these things are far more frequently left to the implied warranties to be spoken of presently. Sometimes an express warranty refers to the place of the ship; as "warranted in such a harbor," or insurance from a place "where the ship now is"; and this means that at the date of the policy, or rather when the insurance is actually made, the ship is at the warranted place.<sup>2</sup> And if there be insurance at or from a certain port, with "warranted in port," this means the port of insurance, unless another meaning is clearly to be gathered from the policy.<sup>3</sup> A warranty that a vessel was well on a certain day

vessel is to take on board her cargo, and that it means something more than merely having the clearances on board and being ready, and that it means her final departure from that port, and being out of the limits of that artificial port, and being at sea ready to proceed upon her voyage . . . . And with reference to the circumstances of the port, we do not think this vessel can be considered as having finally sailed from her port of lading."

<sup>1</sup> In *Sharp v. Gibbs*, 1 H. & N. 801, 40 Eng. L. & Eq. 383, there was a stipulation in the charter-party that if the ship should be "despatched" from Australia within twenty-one days after her arrival, the owners should be entitled to a higher rate of freight than that previously agreed on. The vessel sailed within the time mentioned, but after proceeding a short time was obliged to put back on account of the insubordination of the crew, and did not finally depart till after the twenty-one days

had expired. Held that she had not been "despatched" within the meaning of that phrase in the charter-party.

<sup>2</sup> *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. 64.

<sup>3</sup> *Kenyon v. Berthon*, 1 Doug. 12, note. In *Colby v. Hunter*, 1 Moody & M. 81, 3 Car. & P. 7, the insurance was from Hamburg to Vigo. The ship was warranted in port on the 19th of October. She was in a port, but not that of Hamburg. It was contended that this satisfied the warranty; but it was held otherwise, Lord *Tenterden*, C. J., remarking that, "if the underwriters had been satisfied with the more general warranty contended for, the usual warranty of 'safe on 19th of October,' would have been the sufficient and proper mode of expressing it."

If the policy had been on time, no *terminus a quo* being mentioned, the construction contended for would probably have been adopted.



has been held to be satisfied by proof that she was so at any time during the day.<sup>1</sup>

A policy on "lawful goods" has been held to cover contraband goods.<sup>2</sup> And a warranty that the vessel "shall have no contraband goods on board" does not refer to illicit trade at the port of destination, but merely to such goods as are contraband of war.<sup>3</sup>

The rotten clause, as it is called, is inserted in many policies. This provides that if a ship, on a regular survey, shall be declared unseaworthy, by reason of being rotten or unsound, the underwriters shall be discharged. Under this clause it is settled that the survey must find the rottenness or unsoundness to be the sole cause of the unseaworthiness;<sup>4</sup> that the underwriters are discharged if the vessel be found rotten at the time of the survey, without reference to her condition when the risk commenced;<sup>5</sup> that the survey need only state facts from which it can be inferred that the unseaworthiness arose solely from rottenness, and need not conform exactly to the expressions used in the policy;<sup>6</sup> that it is sufficient if the survey be made in a reasonable time after the termination of the voyage;<sup>7</sup> and that the report of the surveyors on a regular survey is conclusive upon the parties.<sup>8</sup> As to what constitutes a regular survey, it has been held that one made by

<sup>1</sup> *Blackhurst v. Cockell*, 3 T. R. 360.

<sup>2</sup> *Seton v. Low*, 1 Johns. Cas. 1; *Juhel v. Rhineland*, 2 Johns. Cas. 120; *Depeyster v. Gardner*, 1 Caines, 492. See also *Skidmore v. Desdoity*, 2 Johns. Cas. 77; *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102.

<sup>3</sup> *Vandevoort v. Smith*, 2 Caines, 155. In regard to the origin of this warranty, see note to *Seton v. Low*, 1 Johns. Cas. 1, 15.

<sup>4</sup> *Innes v. Alliance Mut. Ins. Co.*, 1 Sandf. 310; *Haff v. Marine Ins. Co.*, 8 Johns. 163; *Griswold v. National Ins. Co.*, 3 Cow. 96; *Armroyd v. Union Ins. Co.*, 2 Binn. 394; *Watson v. Ins. Co. of N. A.*, 2 Wash. C. C. 152. In *Rogers v. Niagara Ins. Co.*, 2 Hall, 86, the defendants pleaded that the vessel sought a port of necessity, that a regular survey was had, that the survey found that

certain parts of the vessel, enumerating them, were rotten, that other parts were so defective that they would require to be shifted, that the repairs would amount to \$3,000, and that, in the opinion of the surveyors, the vessel was unworthy of repairs, and would not sell for the amount of the bills. On demurrer, this plea was held to be a good bar to the plaintiff's action.

<sup>5</sup> *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581.

<sup>6</sup> *Brandegge v. National Ins. Co.*, 20 Johns. 328; *Steinmetz v. United States Ins. Co.*, 2 S. & R. 293; *Rogers v. Niagara Ins. Co.*, 2 Hall, 86.

<sup>7</sup> *Griswold v. National Ins. Co.*, 3 Cow. 96, 98.

<sup>8</sup> *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581.

surveyors, appointed by the American consul at a foreign port, is such.<sup>1</sup> So is one by surveyors under a State law, there being no act of Congress upon the subject.<sup>2</sup> If the survey is instituted at the instigation of the master, it is conclusive upon the owners of the vessel.<sup>3</sup>

If the assured warrants that "orders will be given that the ship shall not cruise," he must explicitly direct the captain not to cruise, and the fact that such orders might be inferred from the instructions is not sufficient.<sup>4</sup>

A warranty that, on a voyage described, the assured shall have a passport from a particular person is only satisfied by a passport for the whole voyage, and it must be such a one as is usually given.<sup>5</sup>

A stipulation to claim, as neutral, in case of capture of a belligerent vessel sailing with neutral papers, is valid; and, if not performed, the insured cannot recover.<sup>6</sup>

The property insured is sometimes warranted free from all liens. This might be of much importance in a fire policy made by a mutual insurance company by whose charter or rules the property insured was pledged for the payment of the premium note. In marine policies, a lien on the ship or cargo might prevent the insured from making an effectual abandonment of the property in case of constructive total loss. On this ground mainly, a marine policy containing this clause was held to be avoided by the fact that the ship was subject to mortgage, although the amount due in case of loss was made payable to a holder of a third mortgage; and it was argued that he was the party actually insured, and that

<sup>1</sup> *Innes v. Alliance Ins. Co.*, 1 Sandf. 310.

<sup>2</sup> *Janney v. Columbian Ins. Co.*, 10 Wheat. 411. In *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, the court said: "A regular survey must, therefore, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be."

<sup>3</sup> *Janney v. Columbian Ins. Co.*, 10 Wheat. 411; *Dorr v. Pacific Ins. Co.*, 7 lb. 581; *Polleys v. Ocean Ins. Co.*, 14 Maine, 141.

<sup>4</sup> *Ogden v. Ash*, 1 Dall. 162.

<sup>5</sup> *Bulkley v. Derby Fishing Co.*, 1 Conn. 571.

<sup>6</sup> *Coolidge v. Blake*, 15 Mass. 429. In *Thatcher v. Bellows*, 13 Mass. 111, the assured agreed, in case of capture, to claim and prosecute as Spanish property, until condemnation in the High Court of Admiralty, or acquittal. And the assurers agreed to contribute to the expenses, according to their respective interests. Held, that the underwriters were not bound to advance funds to prosecute the appeal.

the interest insured was that of a mortgagee, and was not subject to any lien.<sup>1</sup>

<sup>1</sup> *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179. *Denio, J.*, said: "It is a principle in the law of marine insurance, that an abandonment upon a total loss must be entire and absolute, and must cover the whole interest insured, so that the insurers may have the benefit of such indemnity as the circumstances will permit. *Arnould on Ins.* 1159. In the case of an actual, as distinguished from a constructive total loss, this principle would not be important; but it would be very material where it was constructive only, and a portion of the property was saved. It has accordingly been held, in a case in Massachusetts, that if the assured, by mortgaging his ship, has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon to the underwriters, but can recover only for the damage he has actually sustained as a partial loss. *Gordon v. Massachusetts Fire and Marine Ins. Co.*, 2 Pick. 249; *Arnould on Ins.* 1161. It was in reference, I presume, to this principle, that the insurers in this case inserted the warranty against liens contained in their policy. Being placed on the footing of a warranty, the existence of liens, contrary to the spirit of the contract, has a much more prejudicial effect upon the interests of the assured than the principle of law which I have mentioned; as the doctrine upon that subject is, that the validity of the entire contract depends upon the literal truth or fulfilment of the warranty. *Arnould*, 577.

"The existence of the two prior mortgages mentioned in the bill of exceptions would seem, therefore, to be fatal

to the recovery in this case, unless the answer given by the plaintiff's counsel avoids the objection. He argues that the contract of insurance was, in fact and in judgment of law, between the plaintiff and the defendants, and that the subject insured was the plaintiff's interest as a mortgagee; and as that interest was, when created, a mortgage upon Crocker's equity of redemption in the vessel, and was as absolute and as free from any lien or encumbrance at the time of the loss as when it was originally created, the warranty respecting liens, if it was applicable at all to the case, was true when made, and was never afterwards broken. There is much greater latitude in applying a policy of insurance to the interest intended to be covered than in other written contracts; and, in general, if it is said to be on the account of a person as agent, or of one for the owner, or for whom it may concern, the party who really procures the insurance, and whose property it was intended to cover, may be shown. *Arnould*, 25, in the notes; Boston ed., 1850.

"The admission in the answer is quite consistent with the position that Crocker was insured as the owner of the vessel, and that the provision for the payment to the plaintiff in case of a loss was simply the consequence of an arrangement, between Crocker and the plaintiff, that the latter should have the avails of Crocker's contract in case a loss should take place.

"The case of *Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn* (17 N. Y. 391), seems to me to be a very strong authority against the plaintiff, and to be quite conclusive upon the case.

In addition to these warranties and stipulations there are some which we have already considered, such as the stipulations in respect to assignments,<sup>1</sup> and clauses relative to prior and subsequent insurances.<sup>2</sup> There are also others which have been introduced from time to time limiting or affecting the common-law rights and liabilities of the parties. So there are warranties intended only to lessen the scope of the insurance; and they have little or no other effect. Thus warranty against loss by fire, or loss by capture, has much the same effect as if the word "fire," or "capture," were struck out of the policy; and warranty against average, unless general, means only that the insurance is not against partial loss. These we shall treat of hereafter.

## SECTION II. — *Of Implied Warranties.*

THERE are many important warranties which are seldom expressed because they are always implied; in other words, it is not necessary that the parties should make them, because the law makes them for the parties. By far the most important of these is the warranty of sea-worthiness. Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is, in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety.<sup>3</sup> And this

McCarty was named as the party insured; but it was added that the loss, if any, was to be paid 'to Grosvenor [the plaintiff], mortgagee.' The intent to secure him in his character as mortgagee was as strong as, upon the admission in the answer, it was in this case to secure the plaintiff as the holder of the chattel mortgage; but it was decided that the contract was between McCarty and the insurance company, and that it was McCarty's house, and not Grosvenor's interest which was insured; and it was accordingly held, that a breach of the conditions of the policy by McCarty was fatal to the recovery. In conformity with this judgment, we are obliged to hold, in this

case, that this policy was upon the vessel, and not upon the mortgage interest, and that Crocker, and not the plaintiff, was the party insured. It follows from this, that the liens which were warranted against were upon the subject insured, and, hence, that they constituted a breach of an express warranty."

<sup>1</sup> See *ante*, p. 59.

<sup>2</sup> See *ante*, p. 285.

<sup>3</sup> In *Dixon v. Sadler*, 5 M. & W. 405, 414, *Parke, B.*, states the law as follows: "In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be sea-worthy, by which it is meant that she shall be in a fit state,

applies to every insurance on a voyage policy, whatever be the interest insured. And in one case where the insurance was effected by salvors on a vessel at and from a certain port to another, the vessel being described in the policy as having been abandoned by her original crew and taken into the port at which the risk was to commence by the salvors in whose interest the policy was declared to be effected, the court held, that a plea that the vessel was unseaworthy at the time of sailing was good.<sup>1</sup>

This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and if this condition be broken, at the inception of the risk in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void.<sup>2</sup> Such is the general principle; but it receives in practice qualifications and modifications which will now be considered.

In the first place it should be stated that this sea-worthiness is not an absolute requirement of the law; it may be waived or modified in any way by the parties. Thus, they may doubtless agree that the ship shall be insured whether sea-worthy or not;<sup>3</sup>

as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it." See also *Wedderburn v. Bell*, 1 Campb. 1; *Myers v. Girard Ins. Co.*, 26 Penn. State, 192; *Cincinnati Mutual Ins. Co. v. May*, 20 Ohio, 211; *McCargo v. Merch. Ins. Co.*, 10 Rob. La. 334; *Prescott v. Union Ins. Co.*, 1 Whart. 399. If insurance is effected on a floating dock, there is an implied warranty that it is sea-worthy, well built, stanch, and capable for the business in which it is to be employed, fitted with machinery, and well protected against accidents arising from the ordinary effects of the elements in which it is to be used. *Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748.

<sup>1</sup> *Knill v. Hooper*, 2 H. & N. 277.

<sup>2</sup> *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mason, 439; *Small v. Gibson*, 16 Q. B. 128, 3 Eng. L. & Eq.

290, 305, per *Parke*, B.; *Wallace v. De Pau*, 2 Bay, 503, 1 Brev. 252.

<sup>3</sup> In *Parfitt v. Thompson*, 13 M. & W. 392, the underwriters agreed to consider the vessel sea-worthy for the voyage. It was contended by the underwriters that this admission merely precluded them from contesting the fact of her sea-worthiness, in case the loss had happened from the perils of the sea, but that if the loss took place in consequence of her unseaworthiness, they were at liberty to take advantage of that fact as a ground for non-payment of the sum insured. But *Pollock*, C. B., in delivering the opinion of the court, said: "I cannot assent to the construction of the defendant's admission of sea-worthiness, which has been contended for. It seems to me that that admission enures for all purposes, and amounts to a dispensation of the usual warranty of sea-worthiness. I

or that any unseaworthiness, not known to the insured, shall not affect his insurance ;<sup>1</sup> but without such a clause the policy is just as much avoided by any actual unseaworthiness which neither was known nor could be known to the insured as if it were known to or caused by him.<sup>2</sup>

If the insurance is at and from a port, there is no implied warranty, in the nature of a condition precedent to the attaching of the policy in the port, that the vessel shall be then sea-worthy in the sense of being fit for sea, and it is sufficient if she is port-worthy.<sup>3</sup> So far the law is clearly settled. But in respect to other points there is a conflict of opinion and authority. Different views may be taken. One, that there is an implied warranty, in the nature of a condition precedent, that the vessel shall be port-worthy at the time the policy attaches, and afterwards sea-worthy at the time she sails ; or, in other words, that a policy "at and from" should be construed as if it were two policies, one

cannot think the parties intended that, if the unseaworthiness alone were the cause of the loss, the plaintiff should have no right to recover. It appears to me, that, if the vessel had foundered in a perfectly calm sea, from a leak occasioned by rottenness, on the day after the policy was effected, the underwriters would have been held liable." See also *Phillips v. Nairne*, 4 C. B. 343. As to what constitutes a waiver of the implied warranty of sea-worthiness, it has been held, that a survey of the vessel for the underwriters by their agent does not. *Danson v. Cawley*, Newfoundland Cas. 433 ; *Myers v. Girard Ins. Co.*, 26 Penn. State, 192. In this last case it was also decided that the fact that the underwriters knew that the vessel was destined for a particular trade would be no waiver, and the court said : " All the authorities establish that a waiver of sea-worthiness, when not expressed in the contract of insurance, is only to be inferred upon clear evidence that the insurer knew that the vessel was unfit to perform the voyage insured, or

that a full representation was made by the assured of the defects of the ship before the completion of the contract." It has been questioned whether advertising to insure goods by particular boats is a waiver of sea-worthiness as to them. *Natchez Ins. Co. v. Stanton*, 2 Smédes & M. 340.

<sup>1</sup> *Vallejo v. Wheeler*, Cowp. 143.

<sup>2</sup> *Lee v. Beach*, Park on Ins. 297, Marsh on Ins. 160 ; *Oliver v. Crowley*, Park on Ins. 298, Marsh. on Ins. 160 ; *Douglas v. Scougall*, 4 Dow, 269, 276 ; *Warren v. United Ins. Co.*, 2 Johns. Cas. 231 ; *Dupeyre v. Western Mar. & F. Ins. Co.*, 2 Rob. La. 457 ; *Porter v. Bussey*, 1 Mass. 436. In *Douglas v. Scougall*, Lord *Eldon* laid down the law as follows : " It is not necessary to inquire whether the owner acted honestly and fairly in the transaction, for it is clear law, that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not sea-worthy, the underwriter is not liable.

<sup>3</sup> See *post*, p. 386. n. 4.



“at” and the other “from.” Another, that the warranty is that the vessel shall be port-worthy at the time the risk commences, but no warranty in the nature of a condition precedent that she shall be sea-worthy when she sails; there being, however, an implied warranty of sea-worthiness when she sails, similar to that which would attach to her when she sailed from a port in the course of a voyage. And, perhaps a third, that the implied warranty applies only to the time of sailing; leaving, however, the underwriters liable for any loss which may take place between the time of the attaching of the risk and the departure of the vessel which is not caused by the vessel not being port-worthy. Which of these views is the most correct it is difficult to determine. Arguments may be adduced in support of each, and in the present state of conflict of opinions and authority the question must still be regarded as an open one. We give below the leading cases.<sup>1</sup>

<sup>1</sup> In *Christie v. Secretan*, 8 T. R. 198, *Lawrence, J.*, speaking of an implied warranty of sea-worthiness, said: “It is implied from the nature of the contract of insurance. The consideration of an insurance is paid, in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium; but if the ship be incapable of performing her voyage, there is no possibility of the underwriter’s gaining the premium, and if the consideration fails, the obligation fails.” From this it might be argued, that as the underwriter earns his premium by the vessel being port-worthy at the time the risk commences, although she is not sea-worthy when she sails, the warranty of sea-worthiness is complied with. And so it has been held in Pennsylvania. *Garrigues v. Coxe*, 4 Binn. 592. The later case of *Prescott v. Union Ins. Co.*, 1 Whart. 406, is not inconsistent with this, for there the subsequent loss was caused by the vessel’s unseaworthiness at the time of sailing.

This case is supported by a *dictum* of *Shaw, C. J.*, in *Paddock v. Franklin Ins. Co.*, 11 Pick. 234. “It would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold that, after the policy has once attached, the implied warranty should be so construed as to exempt the underwriter from all loss or damage which did or might proceed from any cause thus warranted against, but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty.” Reference is then made to *Weir v. Aberdeen*, 2 B. & Ald. 320, cited *post*, p. 378, n. 1, and it is suggested that the fact that the insurance was “at and from the port” would reconcile it with the course of decisions. The court also said that they did not intend to give any opinion on the point. In *Taylor v. Lowell*, 3 Mass. 348, 349, in defence of a suit for a premium of insurance, it was contended that, as the vessel was not sea-worthy when she left port,



If the insurance is at and from two ports, it has been held that there is no implied warranty, in the nature of a condition precedent,

the policy did not attach, and therefore the insured was not liable for the premium. *Sewall, J.*, said: "Respecting the insurance upon the ship, the conclusion is that, notwithstanding her latent defects, the insurers, though not liable for any loss occasioned by those defects, were answerable for any other loss within the terms of the policy which might have occurred to the vessel while in port and before sailing." And in considering whether the rule was the same in respect to the cargo, the same judge said: "The circumstance by which the breach is ascertained, to the effect of avoiding the policy, is the sailing of the vessel in an innavigable state. Until then there is an opportunity for the cure of latent defects, if they should be discovered; and their mere existence, while not prejudicial or material to the risk insured, is not a forfeiture of the contract." And in *Merchants' Ins. Co. v. Clapp*, 11 Pick. 65, *Wilde, J.*, said, after stating that the correctness of *Taylor v. Lowell* had never been called in question: "The implied warranty is the same in an insurance on goods and freight as it is in an insurance upon the vessel. It is that the vessel shall be in a navigable state *at the time she sails*. This is a reasonable construction of the implied warranty, but it would be most unreasonable to extend it back to the time when the vessel is in port." It is also worthy of remark that, in the subsequent case of *Desbon v. Merchants' Ins. Co.*, 11 Met. 208, the point that there was an implied warranty in an insurance "at and from" that the vessel should be sea-worthy when leaving port, was conceded by counsel of the

highest ability. The vessel sailed with her water on deck, and was lost by fire. The only question discussed was whether the having the water on deck rendered the vessel unseaworthy. And in the more recent case of *Hoxie v. Pacific Ins. Co.*, 7 Allen, 211, where insurance was effected on time on a vessel at and from Bermuda, and there was no question but that at the time the policy attached the vessel was port-worthy, *Bigelow, C. J.*, said: "The question to be determined is, whether, in a policy on time upon a vessel so situated, there is an implied warranty for sea-worthiness, similar to that which the law implies in case of a voyage policy; that is, that the vessel is not only sea-worthy for port, but also in a suitable condition for sea, by a breach of which the insurers are discharged from liability for loss happening from any cause." Lord *Kenyon*, in *Forbes v. Wilson, Park, Ins.* 299, seems to imply that where the insurance is "at and from," the warranty is that the vessel shall be sea-worthy when she sails; but it was in answer to the objection that, as she was not sea-worthy when the risk commenced, a subsequent repairing would not cure the defect. And there are many *dicta* to the effect that the implied warranty is that the vessel shall be sea-worthy when she sails; as in *Bennon v. Woodbridge*, 2 Doug. 789, by Lord *Mansfield, C. J.* But these are of only slight service in determining the question we are now considering. In *Wedderburn v. Bell*, 1 Campb. 1, the insurance was "at and from Jamaica." At the time the vessel left Jamaica her sails were defective. She sailed with convoy, parted from it, and was not heard of again.

that the vessel shall be sea-worthy when she sails from the second port, although the ports are in the same country, and the vessel is to take in a portion of her cargo at both.<sup>1</sup>

How far this obligation of sea-worthiness extends neither is nor ever can be settled by positive definition or rules of law, for the reason that improvements and changes in navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so, when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages, or used for certain purposes, shall have them. The question has arisen, how far a non-compliance with statutory requirements constitutes or proves unseaworthiness. Thus, it is certain that food, water, fuel, and lights are always necessary;<sup>2</sup> and they

Lord *Ellenborough* considered that the policy never attached. This is certainly an inaccurate expression, but the decision is doubtless correct, since the loss might well be considered as owing to the unseaworthiness. In *Annen v. Woodman*, 3 Taunt. 299, the vessel was sea-worthy for port, but sailed in an unseaworthy condition, and was injured. There was a conflict of evidence whether the injury was occasioned by her striking an anchor or by the rottenness of her timbers. The plaintiff finally admitted that the vessel was not sea-worthy, and endeavored to recover back the premium. Undoubtedly if the loss is occasioned by the vessel being unseaworthy when she leaves port, the underwriters are discharged. *Oliver v. Crowley*, Park, Ins. 298, and *Watson v. Clark*, 1 Dow, 344, may have been decided on this principle. There the vessel was so unseaworthy that, soon after leaving port, she sprung a leak, put back, and on the way struck on a reef of rocks and was lost. Here the loss was a direct consequence of her leaving port in an unseaworthy condition. *Weir v. Aberdeen* we have already referred to. In *Knill v. Hooper*, 2 H. & N. 277, insurance was effected

on a vessel "at and from Terceira" to a port in the United Kingdom. A plea that the vessel was unseaworthy when she sailed on the voyage was held good. The question now under consideration was not discussed, and the only question which was considered was that stated *ante*, p. 368, n. 1. If the law is that the vessel must be port-worthy in order that the policy may attach, the rule in respect to the departure from the port should be the same as that which governs the case of a departure from any subsequent port, viz. that the insurer is liable for any loss which is not owing to the unseaworthiness of the vessel. Certainly there is no more justice in holding the insurer liable in the one case than in the other.

<sup>1</sup> *The Admiral Collingwood*, Sup. Ct. Cape of Good Hope, 1 Law Times, N. S. 496. Two judges so held, one dissented, and the fourth stated that he did not agree with the majority, but, to prevent a division, expressed no opinion.

<sup>2</sup> *Fontaine v. Phoenix Ins. Co.*, 10 Johns. 58; *Moses v. Sun Mutual Ins. Co.*, 1 Duer, 159. And they must be sufficient in quantity for the whole voyage, even though the vessel has permis-

must be sufficient, not only in quantity, but in quality. To secure this, the statute of the United States of 1790, c. 56, § 9, requires that every vessel bound on a voyage across the Atlantic shall have a certain quantity of water on board. If a vessel had this quantity on board, it would be difficult to say that she needed a larger quantity to make her sea-worthy. It has been held, however, that she may have a smaller quantity and still be sea-worthy;<sup>1</sup> the court holding that the statute was only directory, and affixed a penalty for a violation of the statute; but that the voyage was not illegal or the ship unseaworthy as a further effect of this violation.<sup>2</sup> This question — when the disregard of statute requirements constitutes unseaworthiness — has quite recently been tried in three cases in England. In two,<sup>3</sup> it was held, in the Queen's Bench, that an infraction of the statute of 16 and 17 Vict., requiring a clearance certificate in certain cases, would not render the voyage illegal and the ship not sea-worthy, unless it could be shown that the ship-owner intended or authorized this violation of the law; but if this were shown, it would have that effect. In the third, which was tried in the Queen's Bench, and taken thence by error to the Exchequer Chamber, the fourth plea was, that a part of the cargo was on deck, contrary to the statute, and that the master had not obtained from the clearing officer any certificate that the whole cargo was under deck, contrary to the statute, and that the plaintiff was owner of the ship. On demurrer and joinder, the Court of the Queen's Bench gave judgment for the plaintiff. The judges of the Exchequer all concurred. They approved the law of the former cases. They say: "It is clear that if the ship-owner had done this, or been cognizant of it, it might have been an illegal voyage, and his insurance have been rendered void. But it is not shown that the ship-owner knew that the timber was to be carried as a deck cargo, nor was he in any way personally a party to the transaction."<sup>4</sup> The fact that all the water on board is carried on deck does not, it has been

sion to stop at an intermediate port.  
*Kettell v. Wiggin*, 13 Mass. 68.

<sup>1</sup> *Warren v. Manufacturers' Ins. Co.*,  
13 Pick. 518.

<sup>2</sup> See also *Atkinson v. Abbott*, 11  
East, 135; and *Ward v. Wood*, 13  
Mass. 539.

<sup>3</sup> *Cunard v. Hyde*, 2 E. & E. 1; *Cunard v. Hyde*, E. B. & E. 670.

<sup>4</sup> *Wilson v. Rankin*, Eng. Law R. 1  
Queen's B. & Exch. p. 162..

held, of itself and as matter of law, render the vessel unseaworthy ; but it is a fact tending to prove unseaworthiness.<sup>1</sup>

Whether a medicine chest,<sup>2</sup> or a chronometer, is necessary, must depend upon the ship and the voyage. So anchors, cables,<sup>3</sup> and sails and cordage,<sup>4</sup> ballast,<sup>5</sup> and storage of cargo,<sup>6</sup> officers and crew, or pilotage,<sup>7</sup> sufficient in one case, are not so in another.

The requirement of sea-worthiness extends especially, and in all particulars, to the officers and crew of a ship. There is, we think, no doubt that by this requirement owners of vessels are not only bound to have a full complement of men and officers on board, but they must have men and officers of competent skill and experience to perform their duty intelligently and understandingly, under all circumstances and in all emergencies.<sup>8</sup> And our notes

<sup>1</sup> *Deshon v. Merchants' Ins. Co.*, 11 Met. 209.

<sup>2</sup> *Woolf v. Claggett*, 3 Esp. 257.

<sup>3</sup> *Wilkie v. Geddes*, 3 Dow, 57. In this case the best bower anchor and the cable of the small bower were defective.

<sup>4</sup> *Wedderburn v. Bell*, 1 Campb. 1, where the maintop-gallant-sail, and the studding-sails were so rotten that the vessel fell behind her convoy and was lost.

<sup>5</sup> *Deblois v. Ocean Ins. Co.*, 16 Pick. 303. See *Dixon v. Sadler*, 5 M. & W. 405.

<sup>6</sup> *Chase v. Eagle Ins. Co.*, 5 Pick. 51.

<sup>7</sup> See *post*, p. 384, n. 3.

<sup>8</sup> So said by *Nelson, J.*, in the case of *The Washington*, 3 Blatchf. C. C. 276. See also *Hunter v. Potts*, Selw. N. P. (11th ed.), 1017, n.; *Forshaw v. Chabert*, 3 Brod. & B. 158. In *Walden v. N. Y. Firem. Ins. Co.*, 12 Johns. 128, 136, the court said: "The assured shall, in good faith, employ a captain of competent nautical skill, and general good character." If, therefore, a captain is so ignorant of the coast that he puts into one port instead of another, whereby he is captured, the vessel is considered as unseaworthy. *Tait v. Levi*, 14 East, 481.

This implied warranty has been carried very far in the late case of *Draper v. Comm. Ins. Co.*, 4 Duer, 234. The defence was, that at the commencement of the risk the vessel was unseaworthy, owing to the incompetency of the master and the insufficiency of the crew. The vessel had formerly been owned by foreigners, and commanded by one McNeil, a British subject. After she became the property of her American owners, one Greene was appointed master, and his name appeared on the registry as such. He also signed the shipping articles, bills of lading, etc. Greene had never been to sea, and it was not intended that he should take any part in the navigation of the vessel, but he was to act as supercargo only. McNeil, who was in every respect a competent person, was hired as the sailing-master, and had the exclusive command of the vessel. The court held, that the vessel was not sea-worthy on account of the incompetency of her captain, Greene.

In *Dow v. Smith*, 1 Caines, 32, it was held, that the captain and one hand were not sufficient for a voyage from New York to Edenton, in a vessel of

will show that it has been deemed an interesting question, how far it is necessary to have officers on board competent in case of an emergency to fulfil the duties of a superior station.<sup>1</sup>

thirty-five to forty tons' burden. In *Silva v. Low*, 1 Johns. Cas. 184, the voyage was from Wilmington, N. C., to Falmouth, and at and from thence to a port of discharge in Great Britain. The vessel sailed with the intention of taking in more seamen at New York, but was lost before arriving at the point where the course to New York diverged from that to Falmouth. The court held, that this intention to deviate showed either that there was not a sufficient number of men on board when the vessel left Wilmington, or else that they were shipped merely to New York, and in either case the implied warranty was broken. If a vessel is insured at and from a port to another, and while at the first port she loses some of her crew, and they cannot be replaced there, she may go to the nearest port to obtain more; and the fact that when she left the port she was not in a seaworthy condition to perform the whole voyage is no defence. *Cruder v. Phil. Ins. Co.*, 2 Wash. C. C. 262. But if the vessel was unseaworthy for the voyage when the risk commenced, she cannot go out of her course to supply such deficiency. *Cruder v. Penn. Ins. Co.*, 2 Wash. C. C. 339. It was held, in *Hucks v. Thornton*, Holt, N. P. 30, that where a vessel is insured on a retrospective policy while at sea, it is sufficient if at the time she has a large enough crew to enable her to pursue any part of her adventure, and it is not necessary that the crew should be sufficient for all the undertaking contemplated when the vessel first set sail. In *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73, it was admitted that it was suf-

ficient for the mate alone to have charge of a vessel while frozen up during the winter; and the question as to the liability of the underwriters, in case the vessel had been unseaworthy through the negligence of the crew, was not decided, though *Bayley, J.*, said: "The owner certainly is bound, in the first instance, to provide the ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage."

<sup>1</sup> In *Clifford v. Hunter*, 3 Car. & P. 16, *Moody & M.* 103, Lord *Tenterden*, C. J., expressed a strong opinion that a vessel, on a voyage from Madras to London, was not sea-worthy unless she had some one on board besides the captain who was capable of navigating her to England. A similar question came up in the case of *Gillespie v. Forsyth*, before the Court of Queen's Bench at Quebec, 2 Law Reporter, 257. The case is the more worthy of notice from the fact that the opinions of Chancellor *Kent*, Professor *Greenleaf*, and the then Attorney-General of England, Sir *J. Campbell*, are published in connection with it. The vessel was insured from Quebec to Montego Bay in the Island of Jamaica, and back to Quebec. On the arrival of the vessel at Montego Bay the supercargo discharged the master, and had his own name indorsed on the register as master. But, previous to the sailing of the vessel, one *Dixon*, who had been the mate, was appointed master, and his name was indorsed on the register, and one of the seamen was appointed mate in his place. This person was an able seaman, but could not write, and *Dixon* was the only per-

A winter voyage requires a different preparation from a summer voyage;<sup>1</sup> a long one from a short one; and, in general, whether any particular thing is necessary is determined very much from usage and from the reason of the case.<sup>2</sup>

The ship must also be properly constructed of proper materials, and in these respects, as in others, adapted to the risk assumed,<sup>3</sup> and must be properly loaded, not only as to the storage of the goods, but regard must be had to their weight and quantity.<sup>4</sup>

son on board capable of navigating the vessel. Diligent search was made, but no person possessing the requisite qualifications could be obtained. The jury found that, considering the nature of the voyage, the vessel was sea-worthy when she left Montego Bay.

Chancellor *Kent* was strongly of the opinion that the right of the owner to change the master was unquestionable, provided a substitute of competent skill was obtained, citing *Walden v. N. Y. Firem. Ins. Co.*, 12 Johns. 128, 136. But if we admit this right, yet if it was necessary that both the master and mate should understand the science of navigation, and the owner, or his agent, should dispossess the master and put the mate in his place, and then be unable to find a competent person to fill the mate's place, would not the underwriters have a good defence?

The finding of the jury in the above case was in accordance with the ruling of the court in *Treadwell v. Union Ins. Co.*, 6 Cow. 270, where it was held, that a vessel on a voyage from North Carolina to New York, with a captain who did not understand the science of navigation, was sea-worthy, if the nature of the voyage were such that this knowledge was not required. It was held, in the case of *Copeland v. New England Mar. Ins. Co.*, 2 Met. 432, that where a vessel was insured on a voyage out and home, and while at the foreign port the captain became insane, and continued

to be in that condition when the vessel sailed, the vessel was sea-worthy, though a captain might have been procured at the foreign port. This decision proceeds on the ground that the mate was a competent person, and should have taken the captain's place. We shall have occasion to refer to this case hereafter. See *post*, p. 381, n. 1.

<sup>1</sup> *Watt v. Morris*, 1 Dow, 32.

<sup>2</sup> In all such cases the question is one of fact for the jury. *Chase v. Eagle Ins. Co.*, 5 Pick. 51; *Bell v. Reed*, 4 Binn. 127; *Clifford v. Hunter*, *Moody & M.* 103, 3 Car. & P. 16; *Gillespie v. Forsyth*, 2 Law Reporter, 257; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 184.

<sup>3</sup> Thus a vessel for a foreign voyage must be built with knees. *Watt v. Morris*, 1 Dow, 32; *Parker v. Potts*, 3 Dow, 23, 32. In a Pennsylvania case the question arose whether a vessel, employed in the navigation of Lake Erie, was unseaworthy which had sliders substituted in the place of cabin doors, and no tarpawling covering for the hatches. The jury having found that these were not necessary, the court refused to set aside the verdict. *Bell v. Reed*, 4 Binn. 127. If the timbers are decayed and the iron-work loose, the vessel is unseaworthy. *Douglas v. Scougal*, 4 Dow, 269.

<sup>4</sup> *Weir v. Aberdeen*, 2 B. & Ald. 320. It has been said, that whether a vessel is overloaded or not depends upon the



In a recent English case a question as to sea-worthiness arose, which we believe to be entirely new, so far as the authorities indicate. It is, Does the implied warranty of sea-worthiness, which attaches to the ship, extend to lighters, in which the cargo is carried from the ship to the shore? It was tried in the Common Pleas, and all of the judges, who gave their opinions *seriatim*, while admitting the question to be so far a new one that they were not guided by authorities, (Erle, C. J., speaking of cases where it has been "glanced at,") agreed that this implied warranty had not this extent. Byles, J., gives as his principal reason, that, if this implied warranty were extended to lighters, it could not stop there, but must apply to rafts or catamarans, to coolies or elephants, who are employed for this purpose on the coast of Madras, or even "to a plank, through the unsoundness of which the goods may be dropped into the sea, and lost or damaged." The inference from this case would be that this implied warranty would be confined to the ship itself.<sup>1</sup> On general principles, we should say, however, that it must reach all the parts or essential appurtenances of the ship. And if the goods while unladen were lost through the weakness of cables or ropes purposely employed in hoisting and necessarily on board for that purpose, which, when the vessel sailed, were unseaworthy, the case might be differently decided. So it should be, too, if the boats in which the goods were sent to the shore were unsound and insufficient when the ship sailed, and the goods were therefore lost.

The policy, we have seen, does not attach to an unseaworthy ship; but if the ship be sea-worthy and the policy attaches, this implied warranty loses its character of a condition precedent; for, if a subsequent breach occurs of a nature to discharge the underwriters for a subsequent loss occasioned by it, they would still be liable for a loss occurring previous to the breach.<sup>2</sup> If there be a deficiency at the commencement of the risk amounting then to unseaworthiness, so that the policy does not then attach in the

capacity of the vessel, and not upon the depth of water over the shoals and bars in the river upon which she is to be navigated. *Cin. Mut. Ins. Co. v. May*, 20 Ohio, 211. But if the vessel was destined to sail on that river, surely the

peculiar exigencies of the river must be considered and prepared for.

<sup>1</sup> *Lane v. Nixon*, English Law Rep. 1 C. P. 412.

<sup>2</sup> See *ante*, p. 341, n. 3.



sense that if a loss occurs the insurers are liable, yet if this deficiency be temporary, capable of speedy and effectual remedy, and is in fact soon remedied, it has been said that the policy may attach as soon as the vessel becomes sea-worthy.<sup>1</sup> As sea-worthiness is a

<sup>1</sup> This doctrine seems to be supported by *Abbott, C. J.*, in *Weir v. Aberdeen*, 2 B. & Ald. 320. The insurance was on the vessel and her outfit at and from London to Bahia. The vessel sailed from London in an unseaworthy condition from being overloaded, and was obliged to put back to the Downs. Application being made to the underwriters, it was agreed that the vessel might discharge part of her cargo at Ramsgate. This was done, and the vessel sailed from R. in a sea-worthy condition. It was contended, that, as the vessel sailed in an unseaworthy condition from London, the policy was void. *Abbott, C. J.*, said: "That proposition would go the length of establishing, that if a vessel, at the outset of her voyage, be by mistake or accident unseaworthy, owing to some defect, which is immediately discovered and remedied before any loss happens in consequence of it, still that the policy would be void, and the underwriters not liable. I confess that I was a little surprised at that proposition, because, if true in point of law, I fear that we should find many cases indeed where it would turn out that the assured could have no claim upon the underwriters, because something was wanting or something excessive, at the instant of the ship's departure, although the want had been supplied, or the excess removed, before the loss happened." *Mr. Justice Story*, in *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 184, speaking of the language of *Abbott, C. J.*, said: "This is an important doctrine, and well worthy of discussion, whenever it comes directly

in judgment." Though the language of *Abbott, C. J.*, was very strong, yet we think the learned judge did not intend to rest the case upon the fact alone of the sea-worthiness of the vessel being restored, but rather on the fact that the underwriters had waived the objection by allowing the vessel to unload at Ramsgate. This is shown by the case supposed of a vessel sailing with only one anchor, and afterwards taking on board another by the consent of the underwriters. No distinction was taken in this case between a policy "from a port," and "at and from" one. The *dictum* of *Story, J.*, in *United States v. Hunt*, 120, 125, seems hardly to justify the inference drawn from it by *Mr. Phillips*. In *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, the defect did not exist at the commencement of the voyage, but the vessel was unseaworthy between two intermediate ports, and was rendered sea-worthy before the loss took place. The same may be said of *Chase v. Eagle Ins. Co.*, 5 Pick. 51. The case of *Stanwood v. Rich*, Sup. Jud. Ct., Mass., cited 1 Phillips, Ins. §§ 701, 726, is not stated sufficiently at length to enable one to determine how far it is to be received as an authority. It appears to have been merely a *nisi prius* case. The cases of *Taylor v. Lowell*, 3 Mass. 331, and *Merch. Ins. Co. v. Clapp*, 11 Pick. 56, were cases of insurance "at and from," and were not decided on the ground that the defect was remedied after the voyage had commenced. We have mentioned these cases because they are cited by *Mr. Phillips* in his valuable work on Insurance, and, there-

condition precedent to the right of the assured to recover, it would seem to belong to him to establish that fact, and so it has been held.<sup>1</sup> Now, however, the law is different in many of the States.<sup>2</sup> But if the vessel springs a leak soon after sailing, without having met with any peril, this raises a presumption that she was unseaworthy when she sailed.<sup>3</sup> In a late case in New York this presumption was applied to quite peculiar circumstances. The vessel sailed from Rio in the morning, and leaked so much, later in the day, that she was obliged to put back. But it could not be said that she had not met with any peril. The captain testified, that the ship behaved well when she sailed; that afterwards the wind

fore, it seems fit that the attention of the reader should be called to them, but they do not seem to us to support the principle contended for, which is, we think, directly opposed to the well-settled rule, that, if the vessel is unseaworthy at the commencement of the risk, the policy never attaches and the underwriters are discharged; and is not merely an exception to that rule. In *M'Millan v. Union Ins. Co.*, Rice, 248, it was held, that the implied warranty applies only to that which is to continue for the whole voyage, and therefore, where a vessel sailed without a pilot, and was lost after she passed the pilotage ground, the underwriters were held liable.

<sup>1</sup> *Tidmarsh v. Wash. F. & M. Ins. Co.*, 4 Mason, 439; *Craig v. United States Ins. Co.*, Pet. C. C. 410; *Moses v. Sun Mutual Insurance Company*, 1 Duer, 159.

<sup>2</sup> Thus, in *Deshon v. Merchants' Ins. Co.*, 11 Met. 199, 207, *Hubbard, J.*, said: "But a usage has existed in this commonwealth for a long course of years, that although the sea-worthiness is a matter of warranty on the part of the assured, and must necessarily be complied with, yet he is not called upon, *in limine*, to give evidence of his having complied with it. It is assumed as a

fact in the absence of fraud, and he has the benefit of the presumption." See also *Taylor v. Lowell*, 3 Mass. 331; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23; *Bullard v. Roger Williams Ins. Co.*, 1 Curtis, C. C. 148; *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474; *Dupeyre v. West. M. & F. Ins. Co.*, 2 Rob. La. 457.

<sup>3</sup> *Monro v. Vandam, Park, Ins.* 289, n.; *Mills v. Roebuck, Marsh. Ins.* 161; *Watson v. Clark*, 1 Dow, 336, 344; *Parker v. Potts*, 3 Dow, 23; *Douglas v. Scougall*, 4 Dow, 269; *Talcot v. Commercial Ins. Co.*, 2 Johns. 124; *Barnewall v. Church*, 1 Caines, 217; *Cort v. Delaware Ins. Co.*, 2 Wash. C. C. 375; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 237; *Deshon v. Merchants' Ins. Co.*, 11 Met. 199, 207; *Myers v. Girard Ins. Co.*, 26 Penn. State, 192; *Prescott v. Union Ins. Co.*, 1 Whart. 399; *Bullard v. Roger Williams Ins. Co.*, 1 Curtis, C. C. 148; *Fleming v. Mar. Ins. Co.*, 3 Watts & S. 144, 153; *Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748; *Dupeyre v. Western M. & F. Ins. Co.*, 2 Rob. La. 457; *Hudson v. Williamson*, 3 Brev. 342; *Wallace v. De Pau*, 2 Bay, 503, 1 Brev. 252. But see *Patrick v. Hallett*, 1 Johns. 241.

arose with a heavy sea, causing the ship "to labor heavily and jump into the sea"; and then she leaked. The jury found a special verdict, that she was sea-worthy when she sailed from Rio. But the court laid this verdict aside, on the ground of the inadequacy of the perils encountered to produce this damage to a sea-worthy vessel, and asserted the right of the court to judge of this fact.<sup>1</sup> Still, this presumption may be rebutted by proof that she was actually sea-worthy when she sailed.<sup>2</sup> And when a vessel is shown to have met with a sea peril, if the insurer claims that the damage was owing to her being unseaworthy and not to the sea peril, the burden is on him to show this.<sup>3</sup> And if the vessel sails and is never heard from, the fact of her sea-worthiness is presumed, in the absence of evidence to the contrary.<sup>4</sup>

If, after the risk has commenced, she becomes unseaworthy by reason of an accident or peril, then the policy continues to attach, until she can again, by reasonable endeavors, be restored to a sea-worthy condition. It is, indeed, the duty of the master, for which the owner is responsible, not only to do all that can be done to prevent her unseaworthiness, but all that should be done to restore her sea-worthiness. If, therefore, she is disabled at sea, though she remains covered by the policy until she reaches a port, she must leave that port, wherever it may be, in a sea-worthy condition, provided she can there be made sea-worthy. And analogy of reason would require that a master, finding his ship unseaworthy at sea, should make, not necessarily at once for the nearest port, but for a port of repair, without unnecessary delay, because otherwise he would expose the vessel to unreasonable and unnecessary danger. So, too, if the unseaworthiness could, without great sacrifice, be cured at sea, by help from another vessel, it should be the master's duty to obtain this help. Whether or when the insurers are discharged by the master's non-fulfilment of such duties, is a more difficult question. On the one hand, although the misconduct or neglect of the officers and crew are not among the dangers against which the owner is insured, yet if the

<sup>1</sup> *Wright v. Orient Ins. Co.*, 6 Bosw. 269.

<sup>2</sup> *Barnewall v. Church*, 1 Caines, 217.

<sup>3</sup> *Deshon v. Merchants' Ins. Co.*, 11

<sup>4</sup> *Snethen v. Memphis Ins. Co.*, 3 La. Met. 199, 207.  
Ann. 474; *Rugely v. Sun Mut. Ins. Co.*,  
of N. Y., 7 La. Ann. 279.

subject-matter insured be lost by a sea peril caused by such negligence, the underwriters are held liable therefor. On the other hand, the master is the representative and agent of the owner, with power and authority, and it is his duty to fulfil for him this warranty of sea-worthiness, and a breach of it by such an agent is a breach by the principal. Perhaps no better answer, or none which more nearly reconciles the conflicting authorities, can be given, than that the decision of the question must depend upon whether the person in command of the ship then acts only in discharge of his personal duties as master, or mate, or acts, or ought to act, as the representative and agent of the master. And, generally, the conclusion would be, that if the ship be sea-worthy in the beginning, a subsequent unseaworthiness, caused by negligence or error of officers or crew, does not take away the responsibility of the insurers, — leaving it still as a rule of law, that it is a duty of the master to repair unseaworthiness in the first port, the disregard of which is a breach of the warranty by the owner.

It is now quite well settled, as is stated more fully elsewhere, that if a loss occurs from a peril insured against, it is no defence to the insurers, that the loss was caused, or the peril made operative and destructive, by the negligence of the master or crew. There seems to be, however, a contradiction, or exception to this rule, in the law of sea-worthiness. For if a vessel leaves port in a sea-worthy condition, becomes unseaworthy, and in that condition reaches a port in which she may be repaired or restored to a sea-worthy condition, and the master neglects so to repair or restore her, and she goes to sea still unseaworthy, and by reason of this neglect of the master to repair her is lost, it is quite well settled in this country that the insurers are not liable.<sup>1</sup>

<sup>1</sup> *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Hazard v. New England Mar. Ins. Co.*, 1 Sumner, 218, 230, 8 Pet. 557; *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 308; *Stewart v. Tenn. Mar. & F. Ins. Co.*, 1 Humph. 242. In *Dupuyre v. Western Mar. & F. Ins. Co.*, 2 Rob. La. 457, a steamboat insured had a cold-water pump to supply her boilers with water. This being out of repair, the engineer took it out and put in a plug in such a negligent manner that, while the boat was lying in still water, she suddenly sunk. The underwriters were held not to be liable. But the captain must have reasonable cause to suspect the existence of the defect while in the intermediate port, and if he is not aware of it, or if he knows it, but has reasonable ground to believe that the

We suppose the law in England at this time to be, that, if a ship which is sea-worthy at the commencement of the voyage

vessel can proceed in safety, the underwriters are liable, although the vessel was not in a sea-worthy condition when she left port. *Starbuck v. New England Marine Ins. Co.*, 19 Pick. 198. To reconcile these cases with the doctrine that the underwriters are liable for a loss, by a peril insured against, consequent on the negligence of the master or crew, a distinction has been made between the negligence of the master when on land and when at sea. Thus *Shaw, C. J.*, in *Copeland v. New England Mar. Ins. Co.*, 2 Met. 432, 443, after citing the language of Baron *Parke*, in *Dixon v. Sadler*, 5 M. & W. 405, that "if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew," says: "If this is to be taken as limited to the cases where the master, officers, and crew act in their own proper sphere, as practically managing and conducting the navigation, and where the master does not stand in the relation of representative and agent of the owners, we think it not inconsistent with the general principle; leaving the owner still bound by the acts of the master, so far as by law and the usage of navigation he is the representative of the owners, executing their express or implied orders, and doing all such acts as an owner himself might and would do, if present. Unless taken with this implied limitation, the principle would seem to be laid down too broadly, and come in conflict with some of the established rules of insurance law." In England it seems now to be held, that negligence of the master

and crew, or persons employed to load the vessel at an intermediate port, will not exonerate the underwriters, although she is lost in consequence of such negligence. *Redman v. Wilson*, 14 M. & W. 476. Notwithstanding the language of *Shaw, C. J.*, in *Copeland v. New England Mar. Ins. Co.*, it is difficult to ascertain on what ground the case was decided other than that laid down in the English authorities. The case may be briefly stated as follows: The vessel was at an intermediate port under the command of an insane captain. The mate was competent to take charge of the vessel, but omitted to do so, and also neglected to procure another captain, although one might have been obtained. The vessel sailed in this condition, and was lost in consequence of it. The court held, that the vessel was sea-worthy at the intermediate port, and that, as the loss was caused by the neglect of the mate to take command, the underwriters were liable. It may be well to state, before proceeding to comment on this case, that the court at the time consisted of but four judges, and that one, Mr. Justice *Wilde*, dissented. The decision was, therefore, by a bare majority; and we think it was incorrect in deciding that the vessel was sea-worthy when she left port. The court said: "If the vessel had an officer on board competent to command, and whose duty it was to command, the vessel could not be deemed unseaworthy." It was not denied that it was the duty of the mate to take the command, and the only question was as to the consequences of such neglect on his part. If repairs had been needed for the ship, and the mate had neglected to procure them, and the ves-

subsequently becomes unseaworthy from any cause whatever other than the wilful and wrongful act of the insured himself, this subsequent unseaworthiness will not discharge the insurer from his liability for a loss subsequent to the unseaworthiness, if that loss be the direct and proximate effect of a peril insured against.<sup>1</sup>

It must, however, still be remarked, that this breach of the warranty of sea-worthiness does not always and necessarily discharge the underwriters, but only suspends their liability. Thus, if a ship loses her anchor in a port where she can get no other, or loses her boat at sea, or loses some of her crew; and reaches a port where these wants could be supplied, but leaves it without supplying them; and proceeds to another port and there supplies them, and so becomes again sea-worthy, the liability of the insurers revives. It was so far suspended during the interruption of the sea-worthiness, that if a loss had happened in that interval, that is, after the master could have supplied her wants, and before he did supply them, and this loss happened by reason of the insufficiency or unseaworthiness of the ship, the underwriters would not have been liable.

The general principles of the law of insurance might seem to lead to the conclusion, that they should still be liable for a loss happening during that interval from any cause in no way connected with the unseaworthiness thus not repaired. It is however considered that the warranty of sea-worthiness is no longer a condition precedent, the policy or obligation for indemnity having once attached; but the correlative obligation of sea-worthiness continues, but will not discharge the insurers from a loss not attributable to the non-fulfilment of that obligation.<sup>2</sup>

sel had consequently been lost, would not the underwriters have been discharged? and how can this case be distinguished from the one in point? The distinction seems to us to be more subtle than just, and it illustrates the impossibility of a uniform application of the rule, *causa proxima non remota spectatur*, which rule we shall consider hereafter.

<sup>1</sup> So stated, substantially, in Shee's recent edition of Marshall on Insurance, p. 122. And see a strong and clear statement of the difference between the

law of England and that of this country in *Gibson v. Small*, 4 H. of L. 358.

<sup>2</sup> Thus in *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 234, *Shaw, C. J.*, said: "It would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold that, after the policy has once attached, the implied warranty should be so construed as to exempt the underwriter from all loss or damage which did or might proceed from any cause thus warranted



As it is essential that a sufficient crew should be shipped at the beginning of the voyage,<sup>1</sup> so it may be requisite that the crew should be shipped for the whole voyage; and this must depend, like most questions of this kind, upon the usage, and the nature of the voyage. It may be the case, that arrangements have been made, or can with sufficient probability be made, to supply at some intermediate port any deficiency which may occur there in the crew; and, if so, it would seem to be enough if the crew be shipped to that port.<sup>2</sup>

So as to pilotage; the ship is unseaworthy if she is without a pilot, where usage and the reason of the case require that she should have one, whether in entering or leaving a port.<sup>3</sup> And yet

against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty." See also *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Capen v. Wash. Ins. Co.*, Sup. Jud. Ct., Mass., 16 Law Reporter, 465; *Starbuck v. N. E. Mar. Ins. Co.*, 19 Pick. 198; *Chase v. Eagle Ins. Co.*, 5 Pick. 51; *Am. Ins. Co. v. Ogden*, 15 Wend. 532, 20 Wend. 287; *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25; *Hazard v. N. E. Mar. Ins. Co.*, 1 Sumner, 218, 230.

<sup>1</sup> *Caldwell v. Western Mar. & F. Ins. Co.*, 19 La. 42. It was held in this case, that, although a competent crew is necessary at the commencement of the voyage, yet the insurers are liable notwithstanding one of the crew was absent, if he could not have averted the loss had he been present. But this cannot be correct as a general principle of law.

<sup>2</sup> *Forshaw v. Chabert*, 3 Brod. & B. 158; *Silva v. Low*, 1 Johns. Cas. 184. See *ante*, p. 374, n. 8.

<sup>3</sup> According to the principles laid down in the late English cases, it appears that if a pilot be properly taken at the commencement of a voyage, no subsequent neglect of the master in not

taking a pilot will discharge the underwriters, unless, perhaps, where one is required by act of Parliament. See *ante*, p. 380, n. 1. Per *Parke*, B., in *Gibson v. Small*, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36; *Dixon v. Sadler*, 5 M. & W. 405, 415, 8 M. & W. 895. The exception of the case where a pilot is required by an act of Parliament rests entirely upon the authority of *Law v. Hollingsworth*, 7 T. R. 160. But that case has been questioned by *Parke*, B., in *Dixon v. Sadler*, 5 M. & W. 415, and by *Tindal*, C. J., in the same case, 8 M. & W. 895. In *Phillips v. Headlam*, 2 B. & Ad. 380, Lord *Tenterden* said: "It may be conceded that a vessel coming out of a harbor must have a pilot, because the captain has it in his power always to procure one." But this, unless limited to the commencement of the voyage, seems to be inconsistent with the law as laid down by *Parke*, B., in *Gibson v. Small*, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36.

In the United States the rule is not perhaps quite settled. See *Stanwood v. Rich*, Sup. Jud. Ct., Mass., cited 1 *Phillips on Ins.* § 715. In *Keeler v. Firemen's Ins. Co.*, 3 Hill, 250, the vessel was sailing up the Potomac without a pilot, and was lost by running ashore.



if a vessel sails to a port where it is not always possible to obtain a pilot, then the law only requires that the master should use all reasonable efforts to obtain one. And if such efforts are made, the want of success does not make the ship unseaworthy in any sense which discharges the insurer.<sup>1</sup> If a pilot be necessary, and a person falsely representing himself as one is in good faith and without gross negligence received as such, there is no breach of the warranty of sea-worthiness;<sup>2</sup> nor is there if the master or some one else on board can direct the ship over the pilotage grounds, and has sufficient skill to perform the duty as a pilot should perform it.<sup>3</sup> Nor should we say, on general principles, that the neglect to receive a pilot where one was required to be taken by a law of the port *necessarily* made the ship unseaworthy.<sup>4</sup>

It was shown that it was customary for vessels of that size to ascend the river without pilots, and that the mate was competent to take the vessel up the river. It was held that the insurers were liable. This was a time policy, and the neglect to take a pilot was after the commencement of the voyage, but the court seemed to be of opinion that the underwriters would have been discharged had the custom of the place and the nature of the navigation required one. In *M'Millan v. Union Ins. Co.*, Rice, 248, in sailing from a port where it was customary to take a pilot, none was taken, and afterwards the vessel was lost, from causes not attributable to the want of a pilot. The underwriters were held liable. And the case was said to depend entirely on the question whether the loss was or was not to be attributed to not having a pilot. See also *De Pau v. Jones*, 1 Brev. 437; *Flanigen v. Washington Ins. Co.*, 7 Barr, 306; *Whitney v. Ocean Ins. Co.*, 14 La. 485.

From these cases it seems to be doubtful whether the want of a pilot would, in any case, constitute such unseaworthi-

ness as would avoid a policy *in toto*; certainly it would not, unless the neglect were at the commencement of the risk. Probably it would be held generally, as in the case of *M'Millan v. Union Ins. Co.*, that the underwriters would be discharged only from losses arising from the want of a pilot.

<sup>1</sup> So said in *Phillips v. Headlam*, 2 B. & Ad. 380.

<sup>2</sup> *Law v. Hollingsworth*, 7 T. R. 160, per Lord *Kenyon*, C. J.

<sup>3</sup> *Keeler v. Firemen's Ins. Co.*, 3 Hill, 250; *Flanigen v. Washington Ins. Co.*, 7 Barr, 306; *M'Millan v. Union Ins. Co.*, Rice, 248. But see, *contra*, *Whitney v. Ocean Ins. Co.*, 14 La. 485. But it rests with the assured to show the competency of the officer who has acted as pilot.

<sup>4</sup> In *Flanigen v. Washington Ins. Co.*, 7 Barr, 306, the statute required a pilot to be taken or a sum of money to be paid. It was held that the statute did not affect the question of sea-worthiness, but that it still depended upon usage and the nature of the navigation. But see *ante*, p. 384, n. 1, as to English rule.

The standard of sea-worthiness varies at different places, and, in general, that must be taken which rules at the place where the vessel belongs.<sup>1</sup>

So, too, this standard varies according to the character of the vessel,<sup>2</sup> her location, the voyage she is to undertake, or the service she is to perform.<sup>3</sup> Thus, if she is in port, she may be sea-worthy for that place, although not for sea.<sup>4</sup> If on the ways for repair,

<sup>1</sup> *Tidmarsh v. Wash. F. & M. Ins. Co.*, 4 Mason, 439, 442. In this case insurance was made in Boston upon a British vessel belonging to the port of Halifax in Nova Scotia. It was held, that the Halifax standard of sea-worthiness was to be taken. See also *Cobb v. New England Mutual M. Ins. Co.*, 6 Gray, 192, 200.

<sup>2</sup> This principle, as applied to steam vessels, requires not only that the hull shall be stanch, tight, and strong, but that the machinery shall be properly constructed, and of sufficient power to perform the contemplated voyage. *Myers v. Girard Ins. Co.*, 26 Penn. State, 192. See, as to floating docks, *Marcy v. Sun Mut. Ins. Co.*, 11 La. An. 748, cited *ante*, p. 367, n. 3.

<sup>3</sup> *Cobb v. New England Mutual M. Ins. Co.*, 6 Gray, 192; *Knill v. Hooper*, 2 H. & N. 277; *Alexander v. Pratt*, 1 Arnould, Ins. 669; *Small v. Gibson*, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 303; *Brown v. Girard*, 4 Yeates, 115.

<sup>4</sup> Thus, in *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 184, the court said: "Sea-worthiness in port, or for temporary purposes, such as mere change of position in the harbor, or proceeding out of port, or lying in the offing, may be one thing, and sea-worthiness for a whole voyage quite another. A policy on a ship at and from a port will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unsea-

worthy." And *Gibbs*, C. J., speaking of a vessel in port, said: "She need have no other men on board than such as are necessary to prevent fire or the like accidents; no sails, provisions, or equipment are necessary." *Abithol v. Bristol*, 6 Taunt. 464. See also *Cruder v. Phil. Ins. Co.*, 2 Wash. C. C. 262; *Annen v. Woodman*, 3 Taunt. 299; *Oliverson v. Loughman*, cited 2 B. & Ald. 322; *Smith v. Surridge*, 4 Esp. 25; *Motteux v. Lond. Ass. Co.*, 1 Atk. 545; *Forbes v. Wilson, Park, Ins.* 299, note; *Taylor v. Lowell*, 3 Mass. 331; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 232; *Ingraham v. South Carolina Ins. Co.*, 2 Const. R. 707. In *Parmeter v. Cousins*, 2 Campb. 285, the vessel was insured "at and from St. Michaels to England." When she arrived at St. Michaels she was leaking badly, and in an unfit condition to take in a cargo, and in great danger from a storm which was then raging. After remaining at anchor over twenty-four hours, she was driven to sea and wrecked. The insurers were held not to be liable. Lord *Ellenborough* said: "While the ship remains at the place, a state of repair and equipment may be sufficient which would constitute unseaworthiness after the commencement of the voyage. But while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have been at the place in good safety. If she arrives at the out-

she may be fit and sufficient for that condition, although she would not be fit to be water-borne. So, too, the insurance may be for a mere temporary purpose; as the going from one harbor to another,<sup>1</sup> or even across a harbor or a strait, or a brief navigation upon inland waters,<sup>2</sup> or "while being safely launched";<sup>3</sup> and, if the ship be sufficient for this purpose, it will not be necessary that she should be in a condition to go to sea. And if there be insurance on ship and goods, while in port, that on the ship may be valid, because she is in a sufficient condition for a ship in port; and that on the goods be invalid, because the ship is not in a proper condition to receive goods on board. While the policy may, in such a case, attach at once to the ship, it may perhaps not attach on cargo or freight until the ship becomes seaworthy to receive her cargo and earn her freight. But this doctrine is supported by strong authorities.<sup>4</sup>

If a voyage policy is to attach to the ship while at sea, or in an intermediate port where repairs cannot be made, then the war-

ward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." See also *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 232; *Cobb v. New England Mutual M. Ins. Co.*, next note.

<sup>1</sup> In *Cobb v. New England Mutual M. Ins. Co.*, 6 Gray, 192, insurance was effected on a vessel when water-borne, at and from Perry, with permission to go to Eastport and thence to a southern port. It was held, that it was sufficient if the vessel was in a fit condition to go to Eastport when she sailed for that place, although she was not fit for sea.

<sup>2</sup> *Bell v. Reed*, 4 Binn. 127.

<sup>3</sup> *Frichette v. State Mut. Ins. Co.*, 3 Bosw. 190.

<sup>4</sup> This doctrine is laid down by Mr. Phillips, and he thinks it is in accordance with general and recognized principles. 1 Phil. on Ins. § 723. But the cases of *Taylor v. Lowell*, 3 Mass. 331, and *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56, hold that in such a case the policy attaches, not only to the

ship, but to the cargo and freight also. Both of these cases were elaborately argued at the bar by very able counsel, and thoroughly considered by the court with reference to this very point; and they no doubt establish the law in Massachusetts. In *Abitbol v. Bristow*, 6 Taunt. 464, goods were insured at and from Mogadore to London. The declaration averred, that, after the loading of the goods on board, the vessel set sail on her intended voyage, and while on the voyage the goods were lost by a peril of the sea. In point of fact the vessel, before she had half her cargo on board, was driven from her moorings by bad weather and lost. The court held, that, as very different degrees of seaworthiness were required while the vessel was in port and while she was at sea, the averment of a loss on the passage required a different declaration and a different state of facts, and the plaintiff was nonsuited. See also *Cruder v. Penn. Ins. Co.*, 2 Wash. C. C. 339.

ranty of sea-worthiness is greatly qualified. It would not be easy, and perhaps not possible, to say, from the present weight of authority, precisely what this qualification is; but we think it may be stated thus: There is a warranty, in such a case, that the ship was fully sea-worthy in the ordinary sense at the original beginning of her voyage, and that she is now sea-worthy in the sense and degree in which that should attach to her present condition; as, if in a port where perfect repairs can be made, and about to proceed on a voyage, then the warranty of sea-worthiness is much the same as at the beginning; if at sea, then she must be sea-worthy, so far as reasonable care and a proper use of the means within reach can make her so; but as neither party can know where she is, nor what her condition is, the warranty of sea-worthiness, or the condition precedent of sea-worthiness, extends only to this,—that she must be in that degree of complete fitness for service which is proper to the place where she is and the means of equipment and repair within reach: so that if at sea, and disabled by loss of sails, or a leak, or the death of a part of the crew, and none of these defects or wants could have been remedied before the policy should attach, the policy does nevertheless attach, notwithstanding the condition precedent of sea-worthiness. If, however, the ship be at that time a wreck, or so much injured that she cannot be rationally regarded as a subject-matter to which the contract of insurance can attach, then it is as if she were wholly lost, or not in existence, and, of course, there is no insurance upon her.<sup>1</sup>

<sup>1</sup> In *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, the insurance was on the cargo of the ship *Tarquin*, “lost or not lost, now on a whaling voyage in the Pacific Ocean.” The ship had been out over three years when the policy was effected. The court held, that the policy related back to the commencement of the risk, and that, if the ship was then sea-worthy, the policy attached. *Shaw*, C. J., however, went on to consider the case in point. He said it might be a matter of doubt whether the rule of sea-worthiness, as a condition precedent, would apply when the policy was to

take effect on a particular day in the latter part of a long whaling voyage in distant seas, and intended to cover only the latter portion of such a voyage. He also said, that, although the rule would probably be applied, yet it would be with great liberality of construction, and what would be a condition of things in such a stage of the voyage sufficient to satisfy the character of sea-worthiness would fall far short of that required at its commencement. In *Gibson v. Small*, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36, *Parke*, B., said: “It is undoubted law that there is an implied warranty,

Another question exists as to this implied warranty in case of time policies, which is involved in still greater difficulty and uncertainty; it is, What is this warranty, or condition, in respect to the continuance and maintenance of the sea-worthiness of the vessel? This subject has been very much considered quite recently in England and in this country. The authorities are entirely irreconcilable. Some eminent English judges go so far as to say that there is no implied warranty of sea-worthiness in time policies. No court in this country has gone to that extent. In a recent case in New York the reasoning in the English cases seems to have been approved, and this warranty brought down to the narrowest limits. On the other hand, in a still later case in Massachusetts, this implied warranty is recognized in time policies not only as distinctly existing, but as subject only to those modifications or qualifications which the nature of time policies and the circumstances of each case make necessary. In our notes we endeavor to exhibit these conflicting views as fully as the space we can give to them permits. We confess that this latest decision appears to us to be sustained by reasons and arguments which we think it would be difficult to answer. The statement of Lord Campbell, that there is *no* implied warranty in a time policy,<sup>1</sup> although apparently approved in later English cases,<sup>2</sup> cannot be law. If a vessel insured in her home port for a year sails in utter weakness and decay, and with no peril whatever she sinks in a day, it is impossible that the insured should recover, and so, indeed, Baron Parke admits,<sup>3</sup> although at one time he seemed to adopt Lord Campbell's view. This broad negation is confined in its application, by the eminent judges who make it, to the implied warranty of sea-worthiness at the beginning of the risk; and the reasoning by which it is sustained seems to be, that a policy on time "is not a contract of in-

with respect to a policy for a voyage, that the ship should be sea-worthy at the commencement of the voyage, or in port when preparing for it, or had been sea-worthy when the voyage insured had been commenced, if the insurance is on a vessel already at sea for the voyage, which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of

sea-worthiness at the commencement of the risk." See also the remarks of *Pollock*, C. B., on page 43.

<sup>1</sup> In *Gibson v. Small*, 4 H. of L. 353.

<sup>2</sup> *Thompson v. Hopper*, 6 Ell. & Bl. 17; *Fawcus v. Sarsfield*, Ib. 192.

<sup>3</sup> See his remarks in *Gibson v. Small*, 4 H. of L. 417.

insurance, but an ordinary contract in writing.”<sup>1</sup> We have no doubt, however, that it is a contract of insurance, and one of great use and importance. At the same time we admit that it is an insurance of a peculiar character, and that the warranty of seaworthiness must be construed here and elsewhere with reference to its subject-matter, and in conformity to its character. Time policies constitute indeed a large and important class of the contracts of insurance in common use; for this method of insurance is much better adapted than any other to many circumstances in which it is desirable that maritime property should be placed under insurance. We have said in our introductory chapter that the requirement of seaworthiness of the vessel is of the very essence of the business of insurance. It should be carefully adapted to every kind of maritime condition; but if it be destroyed in any, that kind of insurance will cease. If, for example, the assertion of Lord Campbell and Baron Parke is to be taken and applied, as literally true, to all time policies, there would soon be an end of time policies. Or rather, as this kind of policy has now become almost indispensable, insurers would insert express warranties, making it possible for them to estimate their risks, and to insure on time for premiums which would be safe for insurers, and yet so low as to permit merchants to pay them. If we say, first, that there is an implied warranty of seaworthiness in time policies, and then, that this warranty must be so qualified as to be adapted to the requirements and circumstances of such risks, the only question is, Where shall we find the necessary or proper qualifying rules?

Amid such conflict of opinions, and upon a subject in itself so difficult, we can scarcely hope to state any conclusions which would commend themselves as entitled to general adoption. We are willing, however, to say, first, that the universal requirement of all insurance, that a vessel shall sail on her voyage in a sea-worthy condition, applies equally to time policies. And we draw the inference that in all such policies there is an implied warranty of seaworthiness at the beginning of the voyage. Then we should be unwilling to say that there was the same implied warranty at the beginning of the risk or of the time; because the seaworthiness then required must depend upon the events which have occurred between the be-

<sup>1</sup> See the remarks of *Erle, J.*, in *Thompson v. Hopper*, 6 Ell. & Bl. 178.



ginning of the voyage and the beginning of the risk. If, by reason of sea perils which have occurred, aided by wear and the mere lapse of time, the vessel has come into a condition very far indeed from what would be sea-worthy at the beginning of the voyage and she were at sea, the policy might still attach. If she were in port in this bad condition, we should say that the policy would attach, if there had been no negligence in putting her into a better condition. But the main question comes in here, — If the vessel be, when the policy attaches, or at any subsequent period, in a port where she can be repaired and made sea-worthy, but these repairs are omitted and she goes to sea in an utterly unseaworthy condition, are the insurers still held? It is plain that they cannot be so held, unless on the supposition, so broadly stated by Campbell and Parke, that there is no implied warranty of seaworthiness in a time policy, or else on the milder supposition, that, the implied warranty of seaworthiness at the beginning of the voyage being satisfied, this warranty has thereafter no application and no operation. We confess ourselves unable to make either of these suppositions. They seem to us opposed to the very nature and fundamental principles of marine insurance. And, holding the principle which we have already stated, — that this warranty of seaworthiness is implied in every contract of insurance in which it is not expressly negatived, and that it is always to be construed in reference to the character and circumstances of the case, — we cannot but think that the essential principle of insurance would be better satisfied by saying that under a time policy, as under every other policy, the vessel must leave every port in a sea-worthy condition, provided she could be put into a sea-worthy condition in that port. There may be reasons for adding this further qualification, that if she leaves such a port in an unseaworthy condition, and is afterwards lost by a peril insured against, which has no connection whatever with her unseaworthiness, the insurers might still be held. Perhaps, too, the reason of the case would suggest another modification of this rule, although it might be difficult to apply it in fact; and that is, if the insurance for a time, say one year, were made with the mutual knowledge and intention that the ship was to pass that year where repairs could not be made or a port be readily reached, as on some of the whaling grounds, then she ought to be, at the outset (on this general principle that the

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standard of sea-worthiness must always be derived from the voyage to be undertaken), in a sufficient condition not to need repairs during that time under ordinary circumstances.

In a leading case in our own courts, in which the question of the implied warranty of sea-worthiness in time policies came up for consideration, it is said: "There can be no doubt, that, after a vessel has met with such accidents, disasters, and losses as to weaken and disable her that she has become incapable of proceeding with reasonable safety, it is the duty of the owner to procure the necessary repairs and supplies as soon and as effectually as he reasonably can do so."<sup>1</sup> And even Lord Campbell, who is so decided in his denial of this implied warranty in time policies, holds as strongly to the rule, that if under such a policy a vessel leaves a port in an unseaworthy condition, in which port she might have been made sea-worthy by repairs which the master neglects to make, and a loss ensues in consequence thereof, insurers are discharged by this negligence of the master. He puts it, however, on the principle that the assured cannot seek indemnity for a loss produced by their own wrongful act. And he holds that the insurers would be discharged, although this wrongful negligence was not the proximate cause of the loss, or *causa causans*, but was only a cause without which the loss would not have happened; that is, if the loss "was incurred or occasioned by, or proceeded from, the wrongful act or neglect of the assured."<sup>2</sup> But if this negligence is wrong, it is so only because it is the neglect of a duty, and that duty must be the duty of making her sea-worthy when she can be made so; and this is substantially a recognition of the universal requirement of sea-worthiness, which operates strictly as a condition precedent only at the beginning of the voyage, and then there is no reference to the question of fault or negligence. We give in our notes the leading cases on this question.<sup>3</sup>

<sup>1</sup> Paddock v. Franklin Ins. Co., 11 Pick. 236.

<sup>2</sup> Thompson v. Hopper, 6 Ell. & Bl. 17.

<sup>3</sup> The earlier cases on this question are Hucks v. Thornton, Holt, N. P. 30; Hollingworth v. Brodrick, 7 Ad. & E. 40; Dixon v. Sadler, 5 M. & W. 405, 414; Sadler v. Dixon, 8 M. & W. 895.

The question arose in the Queen's Bench, in Small v. Gibson, 16 Q. B. 128, 3 Eng. L. & Eq. 290, whether there was any warranty of sea-worthiness at the time the risk commenced, or at the making of the policy. Insurance was made on the ship, Susan, "lost or not lost," for twelve months, commencing September 25, 1853. The defend-

A question not altogether dissimilar from that we have considered may arise where the insurance is from one port to another,

ant pleaded that the vessel was unseaworthy at the time the policy was made, and on September 25th, when the risk commenced. The Court of Queen's Bench sustained this plea, but it was reversed in the Exchequer Chamber, 16 Q. B. 141, 3 Eng. L. & Eq. 299. The case was then taken by writ of error to the House of Lords, and the decision of the Exchequer Chamber affirmed. 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16. The plea, as stated in 3 Eng. L. & Eq. 299, would seem to show that the defence was taken that the vessel was unseaworthy when she left home on the voyage. That this was not so is shown by the plea, as given in the report of the case before the House of Lords, and by the remarks of *Parke, B.*, on this point, 24 Eng. L. & Eq. 42. This question was, however, presented to the judges and by them considered, though they expressly stated that it was not necessary to decide it. In 3 Eng. L. & Eq. 299, 307, *Parke, B.*, said: "We are far from saying that there is no warranty of sea-worthiness at all,—so to hold would be to let in the mischief which the law provides against by the implied warranty in a voyage policy,—or that there is not the same warranty in the case of a time policy, according to the situation in which the ship may be at the commencement of the term of the insurance; that is, that the ship is, or shall be, sea-worthy for that voyage, if the ship then be about to sail on a voyage; if in port, that she was in a proper condition for such a port; if she be at sea, that she was sea-worthy when the voyage commenced; in short, that the obligation on the assured is just the same in the time policy as if the service

in which the vessel was, or was intended to be engaged, or might be engaged, during the term, was inserted in the policy. If, then, a ship were insured in terms, from a given day, for the remainder of the then voyage to a foreign port and back to England, until another given day, there may be a warranty of sea-worthiness when the voyage commenced." He then said that if the vessel had met with danger, and could have been repaired, but was not, previous to the commencement of the risk, the policy might not attach; and that all the court intended to decide was, that there was no warranty of sea-worthiness wherever the ship might be, or in whatever circumstances placed, at the commencement of the term insured.

In the House of Lords the judges stood seven to two on the questions presented by the plea. Lord *St. Leonards* and Lord *Campbell* concurred with the majority. The point in regard to a time policy on a vessel beginning the risk on her departure from her home port was not discussed by all the judges. Lord *Campbell* was in favor of there not being an implied warranty in any case. Lord *St. Leonards*, and *Martin, B.*, thought the same rule would apply to a time, as well as to a voyage contract of insurance. It has since been decided that if a vessel leaves an intermediate port with an insufficient crew, and is lost in consequence thereof, the underwriters are liable, although a crew might have been obtained there. *Jenkins v. Heycock*, 8 Moore, P. C. 351. The court also said: "If it were necessary for the decision of this case, we should be inclined to go to the full extent of what Lord *Campbell* says in

but may cover many vessels and many voyages. In a case before the Superior Court in New York, the insurance was "from New

the House of Lords." In *Michael v. Tredwin*, 17 C. B. 551, 33 Eng. L. & Eq. 325, the insurance was on the ship "from the meridian of the day of sailing from S. to the meridian of the 20th of March, 1853." The defendant pleaded that the ship was not, at the time of sailing from S. or at any time of the day of sailing from S., or afterwards during the risk, sea-worthy. The court held, that, as the defendant did not set forth in his plea that this was a policy to commence at the beginning of a voyage from S., the case came within the most limited operation of the decision in *Gibson v. Small*. Mr. Justice *Cresswell*, during the argument, said: "You say that you claim to treat this as a policy to attach on the commencement of the voyage. Dare you aver that in your plea? If you dare not, why should you have the benefit of a supposed fact which you are not prepared to aver in your pleadings?" And the Court of Queen's Bench, in a subsequent case, have carried the doctrine of there being no implied warranty to the fullest extent. The defendant pleaded that at the time when the policy was effected, and down to the time of sending the ship to sea, she was an outward-bound ship lying in a British port, where the plaintiffs, her owners, resided; that the ship was chartered for a voyage, and that the plaintiffs sent her to sea in an unseaworthy state, and when she was not in a fit condition to go to sea, and that she was afterwards while on the high seas in that condition lost. The second plea alleged that the plaintiffs, knowingly, wilfully, wrongfully, and improperly sent the ship out to sea in an unseaworthy

state, and when she was not in a fit condition safely to go to sea, and that while she was on the high seas in that condition she was lost. The third plea alleged that the plaintiffs knowingly, wilfully, wrongfully, and improperly sent the ship to sea in an unseaworthy state, and when she was not fitted for the voyage, and when she was not in a fit condition safely to go to sea, and at a time when it was dangerous for her to go to sea in the condition in which she then was, and that the plaintiffs wrongfully and improperly caused and permitted her to be on the high seas in the condition aforesaid, and without a master or proper crew to navigate her on her voyage, during which time, by reason of the premises, she was wrecked and lost. The court held, *Erle, J.*, dissenting, that the plaintiff was entitled to judgment on the first and second pleas, and the defendant to judgment on the third, on the ground, not that there was any warranty of sea-worthiness, but that personal misconduct was charged upon the plaintiffs, which misconduct produced the loss. Mr. Justice *Erle* was of the opinion that the defendant was entitled to a verdict on all the counts. *Thompson v. Hopper*, 6 Ellis & B. 172. Issue was joined on the third plea, and the court held that the jury should have been instructed to find whether the conduct of the plaintiff in sending the vessel to sea in an improper condition was a cause without which the loss would not have happened. And the instruction having been given that the jury were to say whether the unseaworthiness was the proximate cause of the loss, a new trial was ordered, with liberty to the plaintiff to appeal. 6 Ellis & B. 937. On this

York by steamer or steamers to Chagres, at and from thence by the usual conveyances across the Isthmus to Panama, and at and

point the case came up in the Exchequer Chamber, Ellis, B. & E. 1028, and the judgment of the Queen's Bench was reversed on the ground that, although the misconduct of the plaintiff occasioned the loss, still, as it was not the proximate cause, the insured was entitled to recover. This view was taken by *Williams, J., Martin, B., Willes, J., and Bramwell, B.* *Pollock, C. B.*, concurred without assigning any reason. *Coakburn, C. J.*, agreed with the majority that the decision of the Queen's Bench should be reversed on the pleadings, *Crowder, J.*, dissenting. The severity of the general rule has been modified to some extent by a subsequent decision in the Court of Queen's Bench; it being held, that, if the ship sails on her first voyage in an unseaworthy condition, the underwriter is not liable for repairs rendered necessary, not by perils of the sea, but by the bad condition of the ship at the commencement of the risk. *Fawcus v. Sarsfield*, 6 Ellis & B. 192.

In this country, in *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 231, 232, *Shaw, C. J.*, said, that if a policy was effected to commence on a ship on a particular day, in the latter part of a long whaling voyage in distant seas, the rule of sea-worthiness would be applied, but with great liberality of construction. In *Martin v. Fishing Ins. Co.*, 20 Pick. 389, it seems to have been taken for granted that there was an implied warranty when the risk commenced. In the case of *American Ins. Co. v. Ogden*, 20 Wend. 287, there was a time policy for six months. The vessel sailed from New York to Charleston, thence to Norfolk, thence to St. Thomas. When she left Charleston she was in an

unseaworthy condition, owing to the loss of the small bower anchor. This might have been replaced at C. On the voyage from Norfolk to St. Thomas she was injured by a storm, and was abandoned at the latter port. The want of the anchor contributed in no degree to the loss. It was contended that there was an implied warranty that the vessel should be sea-worthy on leaving every port which she visited, but the court held, that the same rule applied as in the case of voyage policies, and that it was sufficient if the vessel was seaworthy when she left New York. In *Jones v. Ins. Co.*, 2 Wallace, C. C. 278, Mr. Justice *Grier* held, that the plea should "state such facts and circumstances as shall show either that, at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of the loss, or that, having come into a distant port in a damaged condition, before or after the commencement of the risk, where she might and ought to have been repaired, and the owner, or his agents, neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship." This case is similar to that of *Michael v. Tredwin*, *supra*. The question came before the Supreme Court of Massachusetts, in a recent case, *Capen v. Washington Ins. Co.*, 12 Cush. 517. The policy was subscribed April 30th. The risk commenced March 30th, at noon, to continue one year on the Ship *Rique* to and at all ports and places to which she might proceed in that time. There was evidence tending to show that the

from thence by steamer or steamers to San Francisco." Bosworth, J., held that the policy covered three distinct voyages by different

vessel was at sea at the time the policy was subscribed; but there was no evidence that at the time the risk commenced she was not either safe in port, or in the prosecution of a voyage on which she had sailed in a sea-worthy condition. The vessel arrived in Boston in September, delivered her cargo in good order, and, after undergoing some slight repairs, sailed for Norfolk. She there took in a heavy cargo, which had a tendency to strain the vessel, and sailed for Sicily. But, having sprung a leak, she put into Savannah, where she was surveyed and extensive repairs ordered; but, as repairs were less expensive in New York, she was slightly but sufficiently repaired at S. and sailed for New York. On the way she was burned at sea. The defence was: First, that at the commencement of the risk on the 30th of March, regarding decay only, this vessel was so much weakened and impaired in strength as not to be able to bear the ordinary perils of navigation, without essential repairs, and replacing with new the timbers thus decayed or beginning to decay, *for and during the term of one year*, for which she was insured; and if so, that she was not sea-worthy within the implied warranty, which the assured were bound by, and so the policy never attached. Second, that this implied warranty attached to the commencement of each voyage, so that if the vessel sailed in an unseaworthy condition, and was lost by a peril insured against, and not in consequence of such unseaworthiness, the underwriters were not liable. Third, that the vessel was unseaworthy when she sailed from Norfolk to Sicily, and also when she sailed from

Savannah to New York. The court held, that on a policy on time for a certain term at all times and places, there is no implied warranty, on the part of the insured, that the vessel is sea-worthy, in the ordinary sense of that term, either at the time the policy is underwritten, or at the day on which the policy, by its terms, commences the risk, but that the only implied warranty in this respect is, that the vessel is in existence as a vessel, not lost at the time fixed for the commencement of the risk; capable, if then in port, of being made useful, with proper repairs and fittings, for navigation, and in a safe or suitable condition for a vessel to be in, whether at sea, or in port, or stripped and under repairs on a suitable railway for that purpose, or otherwise, and is sea-worthy when she first sails from port, and if she is at sea, that she has sailed in a sea-worthy condition, and is safe (*salvus* — not lost) so as to be a proper subject for a contract of insurance at the time the risk attaches; and if the vessel is in such a condition, and the implied warranty to this extent is not broken, the policy attaches, and is not void, and the premium cannot be recovered back. But if the vessel was then lost, become a wreck, or had ceased to exist as a vessel, or was, if at sea, in a condition or under circumstances in which she could not, on her arrival in port, be made available by reasonable or suitable repairs and fitting for navigation, then there was no subject for the policy to take effect upon, and the contract would be void. Held, also, that there was no implied warranty at subsequent ports, but that the owners were obliged to render her sea-worthy if possible,

conveyances, and that the implied warranty of sea-worthiness attached at the commencement of each. But Hoffman, J., held, that,

and if she sailed in an unseaworthy condition, and was lost in consequence of such default, the insured would not be entitled to recover; but if she was lost by a peril insured against, not caused in whole or in part by such default, the underwriters would be liable.

In *Hathaway v. Sun Ins. Co.*, 8 Bosw. 33. The defendants insured \$10,000 on the brig Brenda, valued at \$20,000, for one year from the 22d of March, 1854. The brig sailed February 5, 1855, from Hong-Kong, bound to Shanghai and back to Hong-Kong. She was driven into Woosung in distress; discharged her cargo there, and made some repairs, and incurred expenses thereby, and on the 10th of March started for Hong-Kong in ballast, in order to make there the repairs necessary to enable her to carry cargo, and was lost before reaching that port. Held, that, being sea-worthy when she left Hong-Kong, there was no implied warranty that she was sea-worthy when she left Woosung. *Hoffman, J.*, held: "It is clear, that, when this particular voyage or passage began, either the implied warranty of sea-worthiness had been fulfilled and exhausted by previous employment of the vessel from the time the policy took effect, or must be assumed to have been complied with and discharged when she sailed on the 4th of February. When, then, the voyage was interrupted by the accidents which drove her into Woosung, when she began to retrace her way to Hong-Kong, and from that time till her destruction, there was no period at which an implied warranty of sea-worthiness had existence."

In *Hoxie v. Pacific Mut. Ins. Co.*, 7

*Allen*, 211, the action was on a policy of insurance, by which the defendants insured the plaintiff in the sum of \$6,000 on the bark Nimrod, for one year, from September 12, 1860. The vessel, having sailed in May, 1860, met with a severe gale, and put into Bermuda, where, by order of surveyors, the cargo was discharged, and extensive repairs on her were made. It was agreed that on the 1st of September, 1860, she was undergoing repairs, which were not completed till the 17th of the same month, and that shortly afterwards she continued her voyage. Soon after sailing she began to leak, and sunk at sea. It was in controversy whether injuries sustained on her passage to Bermuda, not sufficiently repaired, occasioned her loss, or whether the loss was attributable to perils occurring after the 12th September, 1860; and the judge, in conformity to a request of the plaintiff, instructed the jury that "if the vessel was sea-worthy when she left Perth Amboy, and if she was injured by the perils of the seas before putting in to Bermuda, and if the master used all care and attention in making repairs, but left port with some injury not repaired because the same was not, after such care and diligence, discovered either by him or the surveyors, the underwriters are not discharged by reason of the non-repair of such undiscovered injury, even if the loss was occasioned thereby." The jury found for the plaintiff, and the defendants alleged exceptions.

*Bigelow, C. J.*, delivered the opinion of the court, from which we take the following: "In this state of facts the question to be determined is, whether,



although the conveyances were different, the voyage was entire, and that the implied warranty of sea-worthiness attached only at the commencement of the voyage from New York.<sup>1</sup>

in a policy on time upon a vessel so situated, there is an implied warranty of sea-worthiness similar to that which the law implies in the case of a voyage policy, that is, that the vessel is not only sea-worthy for port, but also in a suitable condition for sea, by a breach of which the insurers are discharged from liability for loss happening from any cause. . . . It cannot be denied that until the recent discussions arising in the cases of *Capen v. Washington Ins. Co.*, 12 Cush. 517, and *Small v. Gibson*, 16 Q. B. 128, 141, it has always been assumed as a settled doctrine of the law of insurance that, in policies on ships and vessels, whether for a voyage or for time, there was an implied warranty of sea-worthiness." [The learned judge here cites the following authorities: *Emerigon*, c. 13, § 3; *Hucks v. Thornton*, Holt, N. P. C. 80; *Hollingsworth v. Brodrick*, 7 Ad. & E. 40; *Sadler v. Dixon*, 8 M. & W. 895; 3 Kent, Comm. 287, 307; *Martin v. Fishing Ins. Co.*, 20 Pick. 389.] "There would seem to be no foundation in the authorities for the position that there is no warranty of sea-worthiness in any policies on time,—a warranty which is said to lie at the basis of the contract of marine insurance. It is easy to see a good reason for holding that a policy on time, effected on a vessel when at sea, does not include any warranty of her sea-worthiness at the commencement of the risk. In such case, the insurance is on a vessel 'in an unknown sea, in an unknown state.' The insured has no means of knowing her actual condition,

or, if she is injured and out of repair, of restoring her to a condition of sea-worthiness. Both parties enter into the contract with a full knowledge of these facts. In such cases the circumstances attending the making of the contract of insurance tend directly to rebut any implication of a warranty of sea-worthiness at the inception of the risk. But when it is attempted to go further, and to say that, because in certain cases of insurance on time it cannot be reasonably held that there is an implied warranty of sea-worthiness at the inception of the risk, there is no such implied warranty at all in any such policy, whatever may be the circumstances under which the contract was entered into, the reasoning is fallacious and unsound. Such a conclusion would be at variance with the authorities and principles on which the doctrine of sea-worthiness as the basis of the contract of insurance is founded, and would wrest a particular class of policies from all the analogies which regulate and govern other contracts of insurance, precisely alike in all respects except in the single particular that the limitation of the risk is regulated by a fixed period of time, instead of by the duration of a voyage, or, as it is sometimes expressed, by the motion of the earth instead of by the motion of the ship. Certainly it would be contrary to all the received canons of legal exposition to construe policies of this nature as if they were isolated contracts, having no connection with or affinity to other similar contracts under the law merchant, and to which only the gen-

<sup>1</sup> *Van Valkenburg v. Astor Mutual Ins. Co.*, 1 Bosw. 61.



The parties may expressly agree that the vessel shall be seaworthy when insured on time, as well as when on a voyage ; and

eral rules regulating the interpretation of ordinary written contracts are to be applied. These policies ought not to be taken out, by the mere force of judicial construction, from the class of contracts to which they belong, or from the rules and principles by which such contracts are interpreted, any further than is rendered absolutely necessary by the peculiar stipulation which distinguishes them from other contracts of marine insurance. . . . It is however urged, and this is the strongest argument against the analogy between time and voyage policies in respect to the warranty of seaworthiness, that in the application of it to the latter, as the nature, extent, and necessities of a specific and designated voyage are known and can be anticipated, a vessel can be prepared and fitted for the service for which she is destined, so as to be sea-worthy in the broadest sense of that term, as understood in the modern practice and law of insurance ; but that in case of a time policy, in which no limits or *termini* are given, except the days named which fix the time, and no specific service or voyage is designated, and the insured is left at liberty to employ his vessel during the time covered by the policy according as his interest or necessities may dictate or require, it would be impracticable to make her sea-worthy for the voyage insured, that is, for the time during which the risk is to continue, and that it would be unreasonable to imply a warranty of sea-worthiness under such circumstances.

“It seems to us that this objection is rather theoretical than practical. There is no doubt that the warranty, if one is

implied, is for the voyage insured, — using this phrase as *nomen juris*, to designate the term covered by the policy, whether its *termini* are fixed by points of place or time ; and that seaworthiness imports, in the law of insurance, a relation between the condition of the ship and the perils she may have to encounter in the situation in which she may be placed ; so that before departure on a voyage, whether limited by designated ports or places, or only by a fixed period of time, she must be fit in a degree which a prudent owner, if uninsured, would require to meet the perils of the service she is engaged in, and to continue so during the voyage, unless exposed to extraordinary damage. . . . In the practical business of insurance the exception would be a rare one in which it would be impracticable to make a vessel sea-worthy for a voyage insured, although designated only by limitations of time. Such exceptional cases form no valid reason for exempting all time policies from a condition of so much importance and value to the insured, which has always hitherto been held to form the basis of the contract of insurance. *Ad ea quæ frequentius accidunt jura adaptantur.* Nor ought it to be overlooked, in the consideration of this question, that the introduction into the law of insurance of a rule which would exempt all policies on time from the implied warranty of sea-worthiness would lead to incongruities and to a want of harmony in the application of well-established principles to the different classes of contracts of marine insurance, which ought, if possible, to be avoided. Take a case which often occurs, of insurance on a vessel like that

a rule of a mutual company that every ship insured by them shall be surveyed once a year by the managing underwriters, and such repairs and materials ordered as are necessary, which orders must be complied with, or the ship "shall not be insured," is in effect an agreement that the ship shall be considered unseaworthy, and the insurance at an end, if these requirements are not complied with.<sup>1</sup>

reported in *Martin v. Fishing Ins. Co.*, 20 Pick. 389, *supra*, by a policy at and from all ports and places to which she may proceed in the coasting trade for six months or a year. The nature and character of the service in which the vessel is to be employed in such a case are well understood, and no difficulty can be experienced in making her seaworthy for the term insured by the policy. No good reason for not implying a warranty of sea-worthiness in such a policy can be given, which would not apply with equal strength to a policy designating the various ports which the vessel could visit in the prosecution of her business during a period equivalent to that covered by a policy on time. Yet if there is no warranty in any time policy, it would be implied in the latter case, while it would be denied in the former, — a distinction which seems to be purely artificial and unsound. The same may be said with equal truth of every policy on time, effected on a vessel bound on a specific voyage in which the term covered by the policy is equivalent to the time necessary to complete the voyage. Every reason exists for the implication of a warranty of sea-worthiness in such a policy which exists in regard to a policy underwritten for the voyage on which the vessel is about to depart. The main ground on which the Court of Queen's Bench seems to have gone in deciding that there is no warranty of sea-worthiness whatever, under any circumstances, in any time policy,

is the inconvenience which might be occasioned in applying the doctrine to certain cases of insurances on time which might arise. But this inconvenience, which we do not deny might sometimes exist, is far less, in our judgment, than would be created by the anomaly of an absolute denial of one of the great principles of marine insurance, in its application to an entire class of contracts, which are almost precisely analogous to those in which it is uniformly and rigorously applied.

"These considerations have led our minds to the conclusion that, on the facts disclosed on the trial (and we do not mean to decide anything beyond the precise case before us), there was an implied warranty of sea-worthiness in the policy declared on, in analogy to that which would exist under similar circumstances in a policy for a voyage; and that the insurance having been effected on a vessel while in port, to take effect from a certain day, which was before she sailed thence, the warranty includes sea-worthiness for port as well as sea-worthiness in setting out therefrom, as in a policy at and from a particular place.

"The case of *Rouse v. Ins. Co.*, 25 Law Reporter, 523, to which our attention has been called, substantially sustains the views above expressed. New trial granted."

<sup>1</sup> *Stewart v. Wilson*, 12 M. & W. 11. The policy in this case was dated February 20, 1841, and was for one year.

The warranty of sea-worthiness, although most important among those implied by law, is not the only one. Another is, that the assured is to make a distinct and honest statement of all material circumstances attending the risk. Another, that the ship shall pursue the course of her voyage in the usual manner, without deviation or change of risk. And, perhaps another, that the risk is to commence and the policy is to attach within a reasonable time; so that, after an unreasonable delay, the policy will not attach at all, because the delay will have the effect of a deviation, at the beginning.

These subjects will be considered separately.

The vessel was surveyed in September, 1841, and the repairs ordered. These were not furnished, and the vessel went to sea in November, and was lost. There was another clause in the policy providing that, should any vessel proceed on an American voyage, the insurance should cease; and it was argued, that, from the different language used in the two clauses, the effect of the rule as to the survey was only to prevent a renewal of the insurance in case of disobedience, and did not render an existing policy. But the court held the effect of the rule was, that the vessel was to be considered unseaworthy, and the insurance void, unless the directions of the managing underwriters were from time to time complied with.

## CHAPTER XIII.

## OF REPRESENTATION.

WE have considered the subject of warranties as expressed by the parties, and then of warranties as they are implied by the written contracts. We have now to consider representations by either party which are not contained in the contract, but which relate to its subject-matter, and affect the rights and obligations of the parties under the contract. The law in relation to these representations when connected with a policy of insurance is somewhat peculiar, and perhaps somewhat difficult. To constitute a representation in the law of insurance, Chief Justice Marshall has said that "there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion."<sup>1</sup> These words were all that the case required; but to complete them as a definition of a representation, we must add that the fact must be material. The representation may be made orally or in writing, or by the exhibition of any written or printed paper.<sup>2</sup> If the representation be false, or, as it is usually called in the books and cases, a misrepresentation, this falsehood avoids the policy.<sup>3</sup> We consider that this is now an established rule of law,

<sup>1</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506. Chief Justice *Marshall* further says: "If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion the majority of the court is understood to concur." For other definitions of a representation, see 1 Arnould on Mar. Ins. 489; 1 Phillips on Mar. Ins. § 524; and for criticisms on these definitions, 2 Duer on Mar. Ins., pp. 643–656.

<sup>2</sup> In 3 Kent's Com. 282, it is said: "A representation relates to facts or information extrinsic to the policy, and may be made by parol or in writing." See

also *Livingston v. Delafield*, 1 Johns. 523, S. C. 3 Caines, 49.

<sup>3</sup> This point is fully discussed in *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush. 342. Mr. Justice *Story*, in *Carpenter v. American Ins. Co.*, 1 Story C. C. 57, says: "We are clearly of opinion that the policy in this case, having been obtained upon a misrepresentation of material facts, is utterly void. . . . A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design." But see *Carpenter v. Prov. Wash. Ins. Co.*, 16

but the ground upon which the rule rests is by no means as certain. On the one hand, fraud vitiates every contract; on the other hand, if there be conversation and negotiation between parties, and this be followed and concluded by a written contract, it is a rule of law that nothing which is not written can be introduced by evidence to vary or avoid the written contract, unless such evidence discloses fraud. Nevertheless, this written contract — a policy of insurance — is avoided by any false representation or concealment of material facts. Thus, in a case before the Court of Exchequer,<sup>1</sup> on a policy of insurance, the counsel says: "A misrepresentation not embodied in the contract cannot vitiate it, except it be fraudulently made." To this Parke, B., replied: "I have not the least doubt about it, except in the case of insurance,

Pet. 495, in which the same judge says: "It is not true that, because a policy is procured by misrepresentation of material facts, it is therefore to be treated in the sense of the law as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon due proof of the acts; but until so avoided, it must be treated for all practical purposes as an existing policy." The doctrine of *Carpneter v. American Ins. Co.* is substantiated by the case in the 6th of Cushing, above cited, in which Mr. Justice *Fletcher* is very clear as to the policy being rendered nugatory by misrepresentation. In this case the court said: "A policy obtained by misrepresentation is in legal intendment no insurance at all; it has no legal effect." And in *Stacey v. Franklin Fire Ins. Co.*, 2 W. & S. 506, 544, 545, the court say: "The defendants' defence rests on this; that the plaintiffs are doubly insured, but if the plaintiffs could at no time have recourse to the North American Company, it cannot with any propriety be said that they are doubly insured. If the plaintiffs have failed to perfect their contract with the subsequent underwriters, by omitting to

have the prior insurance allowed and specified on the policy as is required, it is difficult to imagine in what way the prior insurance can be invalidated or effected. It is a vain, nugatory, void act." In *Jackson v. Farmers' Mutual Fire Ins. Co.*, 5 Gray, 52, there was a provision in a policy that an increase of risk should render it void; and the court held that a subsequent policy, which provided that the existence of other insurance should discharge the underwriter, remained in force, the former policy being avoided by a change of risk. See the old case of *Carter v. Boehm*, 3 Burr. 1905–1909, in which Lord *Mansfield* said: "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is vastly different from the risk understood and intended to be run at the time of the agreement." See also *Catron v. Tennessee Ins. Co.*, 6 Humph. 176; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Williams v. Smith*, 2 Caines, 13.

<sup>1</sup> *Elkinson v. Janson*, 13 M. & W. 658.

which is a contract *uberrimæ fidei*, vitiated not only by the slightest fraud, but by any misrepresentation or concealment of material facts, which are deemed equivalent to fraud.”<sup>1</sup> The assertion of

<sup>1</sup> In the late case of *Lewis v. Eagle Ins. Co.*, 10 Gray, 508, the action was on a policy of insurance on the schooner *Emeline*, valued therein at \$6,000. The vessel while on a voyage under the policy put in to the port of Nassau, N. P., in a leaky condition, was surveyed, condemned, and sold, and the plaintiffs claimed a constructive total loss. The defendants, in their answer, alleged that the valuation by the plaintiffs, made when insurance was asked for, “was a gross and fraudulent overvaluation,” and that they were induced to write the policy “by the fraudulent representations of the plaintiffs,” and offered evidence tending to prove the truth of the allegations. The presiding judge instructed the jury, in substance, that the law requires good faith in contracts of insurance; that a misrepresentation is a false representation of a material fact, by one of the parties, tending to induce the other to enter into the contract; that this principle, applicable to all contracts, has peculiar bearing on contracts of insurance; that the answer of the defendants required proof that the representation was false as well as fraudulent, and in point of fact induced the defendants to make the contract. On exception, the judgment of the court was delivered by *Merrick, J.*, in which he said: “Whether the representation was designedly and intentionally erroneous, and made with the corrupt purpose of gaining an undue advantage or not, is immaterial to the question at issue between the parties; for if it was false, it clearly exonerated the defendants from the performance of the contract on their part, and wholly

avoided the policy.” In *Cornfoot v. Fowke*, 6 M. & W. 358, the action was for non-performance of an agreement to take a house. Plea, that the plaintiff caused and procured the defendant to enter into the agreement by fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him, on which issue was joined. It appeared at the trial that the plaintiff had employed one C. to let the house in question, and the defendant, being in treaty with C. for taking it, asked him “if there were any objection to the house,” to which he answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not. Held (*Lord Abinger, C. B.*, dissenting), that it was sufficient to support the plea that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; and that as the representation was not embodied in the contract, the contract could not be effected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representations of the agent that it did not exist, were not enough to constitute fraud so as to support the plea. The dissenting opinion of *Lord Abinger*, pp. 378, 379, says: “In the case of *Hodsdon v. Richardson*, 1 W. Bl. 463, Mr. Justice *Yates* lays down as a general principle, that ‘the conceal-

counsel was founded upon the decision of a majority of the same court in an earlier case, which was not upon a policy, and in

ment of material circumstances vitiates all contracts, upon the principles of natural law.' If this be true, can it be doubted that the false representation of a material circumstance also vitiates a contract? These principles are familiar to every person conversant with the law of insurance. But a policy of insurance is a contract, and is to be governed by the same principles that govern other contracts. When it is said to be a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract, on the ground of a legal fraud." In the case of *Pawson v. Watson*, Cowp. 785, Lord *Mansfield* lays it down, generally, that, in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false. And Mr. Justice *Story*, in his *Commentaries on Equity Jurisprudence*, I. 166, § 193, says: "Whether the party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if a party innocently misrepresents

a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party." It is held in *Anderson v. Thornton*, 20 Eng. L. & Eq. 339, that where to an action on a policy of insurance a plea that the insurer was induced to enter into the policy by a false misrepresentation of a material fact, made by the assured and their agent, such misrepresentation being, at the time it was made, false, to the knowledge of the insured and their agent, it is supported by proof either of concealment or misrepresentation not fraudulent. See also *Southall v. Rigg*, S. C. 11 C. B. 481. It appeared in *Humphreys v. Pratt*, 5 Bligh, 154, that a sheriff, at the representation of the plaintiff in a suit, had seized goods under a *fieri facias*, as belonging to the defendant, and damages were recovered against the sheriff for the seizure, by a third person claiming the ownership. It was held that an action on the case lies at the suit of the sheriff, upon the false representation; and on a motion in arrest of judgment, a declaration stating such a case was held good, without averment of fraud in the representation or knowledge of its falsehood. See also *Railton v. Matthews*, 10 C. & F. 934, in which a party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety,



which Parke, B., one of the majority, laid down the law as stated by the counsel. It is not quite clear what Baron Parke means by

would have prevented him from undertaking the obligation. On the trial of an issue, whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury that the concealment to be undue must be wilful and intentional, with a view to the advantages the employers were thereby to gain. Held by the Lords (reversing the judgment of the Court of Sessions), that the direction was wrong in point of law. Mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of a person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. See also *Commonwealth v. Squire*, 1 Met. 258, and *Commonwealth v. Baker*, 10 Cush. 405, for effect of the word 'felonious.' In *Anderson v. Thornton*, *supra*, which was an action on a policy of insurance, it does not clearly appear from the pleas, as they are stated in the report of the case, that fraud was alleged, but the language of the court shows that this must have been the case, Parke, B., said: "Much reliance was placed on the form of the sixth and seventh pleas, and it was contended that, inasmuch as those pleas alleged a fraudulent misrepresentation on the part of the plaintiff, in order to sustain the pleas, it was necessary to prove the fact as fully as alleged; and it was very strongly urged that the plaintiff had been subjected to a great hardship in being compelled to combat such pleas by having to procure evidence to disprove the matters of

fraud, it turning out afterwards, on the trial, that there was no such imputation of fraud on the plaintiff. But the pleas were supported by proof of material communications by the agents; for, in cases of insurance, material misstatement or concealment vitiates the contract, and whether it be fraudulently made or not is a matter which is wholly immaterial, except with reference to a return of premiums." See also *Smout v. Ilberry*, 10 M. & W. 1. *Per contra*, see *Pasley v. Freeman*, 3 T. R. 51, the principles of which have been embodied in succeeding cases. In *Collins v. Evans*, 5 Ad. & E. N. S. 820, Tindale, C. J., said: "The current of authorities, from *Pasley v. Freeman* downwards, has laid down the general rule of law to be that fraud must concur with the false statement, in order to give a ground for action." In that case the defendant knew the statement which he made was false, and it was held that action would lie. In *Haycraft v. Creary*, 2 East, 92, the defendant made a false representation, but did not know it to be false; on the contrary, he believed it to be true; and it was held no action would lie. But these cases are similar in their nature to *Humphreys v. Pratt*, *supra*; and it is worthy of note that Lord Mansfield, in *Bree v. Holbech*, Dougl. 656, says: "There may be many cases where the operation of a false fact, though unknown to be false to the party making the assertion, will be fraudulent." And he cites the case of one C., who 'insured a life and affirmed it to be as good a life as any in England, without knowing whether it was or was not.' It is worthy of remark, that, while in one case, *Smout v.*

the words above cited. They may mean that, in the cases of insurance, any misrepresentation or concealment of material facts would be deemed sufficient evidence of fraud. This is the view taken by Mr. Arnould,<sup>1</sup> who rests the effect of misrepresentation, in avoiding a policy, entirely upon fraud, actual or constructive. We think it difficult to maintain this ground in the present state of the law of insurance; for we consider that this law, both in England and in this country, would avoid a policy which had been procured and made upon a false representation of a material fact, although the insured when making it was ignorant of its falsehood, and wholly innocent of any purpose of deception.<sup>2</sup> The words of Baron Parke admit this view; for they may mean that policies of insurance are avoided not only by the slightest fraud, but, in the absence of all fraud, by a false representation, because that is "equivalent to fraud" in its operation. We prefer this view, and regard it as more consonant with the present law on this subject. If the rule be otherwise in reference to other written contracts, of which, in the conflict of authority, we are not sure, it may be enough to say that this rule is one of the peculiarities of contracts of insurance.

Representations differ from warranties in important particulars. It may be true as a general rule that one broad difference between them consists in the fact, that all possible statements and stipulations relating to the subject-matter of the insurance, and *inserted*

Ilberry, 10 M. & W. 1, the doctrine that misrepresentation avoids the contract, whether fraudulently made or not, is distinctly affirmed; in other cases in the same court the opposite doctrine is declared with equal clearness. *Moens v. Hayworth*, 10 M. & W. 147; *Taylor v. Ashton*, 11 M. & W. 401; for a very fine distinction, to wit, that "corrupt notice is not essential to an action for the fraud; but if the defendant's representation is untrue to his knowledge, he is liable; though if he has good reason to believe his representation to be true he would incur no liability," see *Polhill v. Walter*, 23 E. C. L. 114. For the benefit of those who may wish to further investigate this subject, we cite *Jones v.*

*Bowden*, 4 Taunt. 847; *Parkinson v. Lee*, 2 East, 314; *Meyer v. Everth*, 4 Campb. 22; *Lessney v. Selby*, 2 Ld. Raymond, 1188; *Langridge v. Levy*, 2 M. & W. 519, and 4 M. & W. 337; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Vernon v. Keyes*, 12 East, 632; *Adamson v. Jarvis*, 4 Bing. 66; *Chalmers v. Payne*, 2 Cr. M. & R. 157; *Freeman v. Baker*, 5 B. & Ad. 597; *Dobell v. Stevens*, 3 B. & C. 623; *Springfield v. Allen*, 2 East, 448; *Smith on Cont.* (3d Am. ed.) 135.

<sup>1</sup> 1 Arnould on Ins., p. 497, § 187.

<sup>2</sup> See *Lewis v. Eagle Ins. Co.*, 10 Gray, 508; opinion of *Abinger*, C. J., in *Cornfoot v. Fowke*, *supra*, p. 404, n. 1.

*in the policy*, will be construed as warranties, unless the policy itself stipulate that they shall not be so construed; and that representations must be outside the policy. But it has also been stated that expectations or suppositions, inserted in the policy, are to be construed, not as warranties, but as representations. We cannot think this correct; we should hold it to be a warranty that the insured did so expect. And Mr. Arnould, speaking of a case in which the policy contains the words "the vessel was expected to be loaded between the 13th and 20th of September,"<sup>1</sup> and saying that this was construed as a representation that the ship had not been loaded within the knowledge of the assured before the 13th of September, closes his paragraph with saying: "And as it turned out that he in fact knew she had [been loaded before the 13th], the policy was held void *on this account*." That is, we should say, on account of the breach of the warranty, and therefore we should say that, whatever might have been the time of her loading, if the insured honestly expected, as he said he did, the policy would not have been avoided by his mistake. The insurer chose to insert his expectation in the policy, required no warranty of the fact, but was contented with the insured's expectation. Had he wished more certainty than this, it would have been attained simply by leaving out the words "expected to be."

Another important difference between warranties and representations is in the requirement of materiality. All express warranties, whether of material fact or not, must be complied with, either on the ground that their expression implies conclusively their materialness, or because a written contract must be performed. But a representation, however false, has no effect upon the policy, unless it be material.<sup>2</sup> It is, however,

<sup>1</sup> 1 Arnould on Ins. 497. In the case of *Stewart v. Morrison*, cited Miller on Ins. 59, the words "the vessel was expected to be loaded between the 13th and 20th of September" were inserted in the policy, and were construed as a representation that the ship had not been loaded within the knowledge of the assured before the 13th of September; and it appearing that, in fact, he did know she had been loaded, the policy was held void on this account.

<sup>2</sup> It was held in *Lynch v. Hamilton*, 3 Taunt. 36, that an insurer is bound to communicate to the underwriters any intelligence he has which may affect the underwriter's choice whether and at what premium he will insure, and this must be communicated, whether in fact true or false. Lord *Mansfield* said: "We decide on the ground of adjudged cases, applied to the circumstances of the present action, namely, that the plaintiff did not communicate a rumor

important to remember that the question as to the materiality of the representation is not whether the fact stated actually did,

prejudicial to the safety of the vessel, when he himself knew it, at the same time understanding as we do that the rumor was groundless." Lord *Mansfield* "had no doubt, upon established principles, that the person insuring is bound to communicate every intelligence he has that may affect the mind of the underwriter in either of these two ways: 1st, as to whether he will insure; and, 2d, at what premium." In this connection see *Seaman v. Fonnereau*, Strange, 1183; *De Costa v. Scandrett*, 2 P. Williams, 170; *Willes v. Glover*, 1 N. R. 14. So material misstatement, through misunderstanding of information, will avoid the policy. In *Macdowall v. Fraser*, Dougl. 260, the action was on a policy of insurance on a ship from New York to Philadelphia. At the time of effecting the insurance, London, January 30th, the broker represented the situation of the ship to be "safe in the Delaware on the 11th December," when, in fact, the vessel was lost on the 9th December. Lord *Mansfield* said: "There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. . . . A representation must be fair and true. It should be true as to all that the insured knows; and if he represents facts to the underwriters without knowing the truth, he takes the risk upon himself. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359; *Hazard, Adm. v. New York Mar. Ins. Co.*, 8 Pet. 557. In *Dennistoun v. Lillie*, 3 Bligh, 202, policy was on ship and goods from Nassau, N. P., to Clyde, Scotland. At the time of making insurance, a letter was shown to the underwriters, containing these words: "The

Brilliant," the vessel insured, "will sail on the 1st of May." But in fact she sailed on the 20th of April, and was captured on the 11th of May. After passing through several courts, in all of which the defence was misrepresentation, the case was finally determined by the Lords of Sessions, in Scotland, in favor of the underwriters, and from their decision the plaintiffs appealed to the House of Lords, in which the judgment of the Court of Sessions was affirmed. In delivering judgment, Lord *Eldon* said: "The letter in which it was expressed that the vessel will sail on the 1st of May was shown to the underwriters; and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of *Barbour v. Fletcher*, the representation is that the vessel was *expected* to sail. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of other vessels, but as to the *Brilliant* the statement is positive. Do the appellants carry their arguments so far as to assert that, in cases which go beyond expectation, when there is a misrepresentation of a material fact without warranty or *mala fides*, the policy, according to the authorities, is not vacated? In case of such a misrepresentation, *mala fides* is not necessary to render the contract inoperative. . . . There is no difference between the representation of an expectation and that of a fact. The former is immaterial, but the latter avoids the policy, if the fact misrepresented be material to the risk." In this case the representation

or possibly could, affect the risk, but whether it would naturally and reasonably influence the insurer, either to make the insurance, or in his estimate of the risk.<sup>1</sup> Nothing is better es-

certainly was not of a *past* fact, and in that sense goes beyond an expectation, which is the construction adopted by the Supreme Court of Mass. in *Rice v. New England Ins. Co.*, 4 Pick. 439; *Kemble v. Bowne*, 1 Caines, 75. A broker, in effecting insurance on a ship, represented that the vessel was at Guadeloupe on the 28th of July previous. The court held that the effect of the representation was to prevent the policy from attaching before the day named, remarking in the opinion: "In a case like this, when a vessel has been long in port previous to an insurance, the risk does not commence until some act be done towards equipping her for the voyage, or on the day on which she is stated, as here, to have been in the port from which she was to sail, — this was the 28th of July, 1800. If she had been lost or injured before that day, the underwriters would not have been liable. When she is stated to have been at Guadeloupe on a certain day, it must mean that she was there in safety, and that no preceding accident was to have been made good by the assured. It cannot, therefore, be material where she was prior to that day, for the parties, by agreement, have ascertained that the risk should commence on the 28th of July." *Callaghan v. Atlantic Ins. Co.*, 1 Edwards, Ch. 64. Application for insurance in these words: "On the ship *Nancy*, at and from the port of Gibraltar (where she now is), to a port in the Mediterranean, \$15,000 on profits." It appeared that the vessel and cargo had been destroyed on the 19th of September; the policy and the application on which it was

based were dated November 12th. The case turned on the construction to be given to the words, "where she now is." The vice-chancellor decided that the words were in effect a warranty (and as such might have been inserted in the policy) that the vessel was in safety at Gibraltar at the date of the application; but that if they were considered as a representation, as the terms were positive, the construction would be the same, — that of exempting the insurers from any liability for a prior loss. See also *Carpenter v. American Ins. Co.*, 1 Story, C. C. 57; *Hazard v. New England Ins. Co.*, 8 Pet. 557; *Alsop v. Coit*, 12 Mass. 40; *Suckley v. Delafield*, 2 Caines, 222; *Murray v. Alsop*, 3 Johns. Ca. 47; *Driscoll v. Passmore*, 1 Bos. & Pull, 200; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Commonwealth Ins. Co. v. Menninger*, 18 Ind. 352.

<sup>1</sup> *Conlon v. Bowne*, 1 Caines, 288, in which a misrepresentation of the date of naturalization was held not material to the risk, and not an avoidance of the policy, as not affecting the interests of the insurers. *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481, in which *Walworth*, Ch., held: "A representation is a matter of collateral information or intelligence relative to the subject and nature of the risk to be assumed, which in itself must have been calculated to increase the responsibility of the underwriter, or to have induced him to have assumed the risk for a smaller premium than he would otherwise have required." *Snyder v. Farmers' Ins. Co.*, 13 Wend. 92; *Walden v. New York Firemen's Ins. Co.*, 12 Johns. 128.

established than that the insurers are discharged, if they can show that they had made the policy, in consequence of certain false representations made to them, when otherwise they would not. Or that they had made it for a lower premium than they would otherwise have demanded. An excellent illustration of this is afforded by those cases in which the policy was avoided, because it had been made in consequence of a previous policy having been made, and this previous policy having been made only to decoy other insurers.<sup>1</sup> These cases show also that what is thus called a representation may be effected without words either spoken or written, but by a deceptive fact. The same rule is illustrated by the avoidance of a policy where the insured falsely stated that he had elsewhere effected insurance on the same interests, and against the same risks, at a lower rate than he had actually paid.<sup>2</sup>

<sup>1</sup> *Whittingham v. Thornburgh*, 2 Vern. 206. The defendant, in March, 1689, caused a policy of insurance to be underwritten on the life of one Harwell, representing him to be "healthy and likely to live." Harwell soon died. It appearing that Thornburgh had no estate or interest that depended on Harwell's life; that Marwood's subscription was only colorable, to draw in others, he being the first subscriber; and that Harwell was in a languishing condition, though Marwood affirmed and pretended he was his neighbor, and a healthful man; and the plaintiff having, on the first discovery of the contrivance, offered to return the premium, and published the fraud, to prevent others from being drawn in; and the defendants, intending to get up a very large subscription, having by a like contrivance got between one and two thousand pounds, on making the like insurance on the life of William Sweeting; — the court therefore decreed the policy of insurance to be delivered up to be cancelled, and a perpetual injunction thereon obtained at law, and the plaintiffs to receive their full costs.

*Wilson v. Duckett*, 3 Burr. 1316; *Ryan v. McNath*, 3 Br. Ch. Rep. 15.

<sup>2</sup> *Sibbald v. Hill*, 2 Dow. P. C. 263. In this case, a London merchant insuring at Leith represented, contrary to the fact, that he had done some insurance at Lloyd's upon the same voyage, at the same premium given to the Leith underwriters, who, not being well acquainted with the nature of the risk themselves, subscribed the policy, from their confidence in the skill and judgment of the London underwriters. Held, by the House of Lords, reversing the judgment of the Court of Sessions, that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk. Lord *Eldon* said: "It appears to me settled, that, if a person meaning to effect an insurance exhibits a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party, and disarm the ordinary prudence exercised in the common transactions of life, and it turns out that this person has not in fact underwritten the policy, or has done so under such terms that he be-



Hence, we should say that it is no answer to the defence of misrepresentation, that subsequent events have proved that the facts falsely stated were wholly immaterial to the risks, and had nothing to do with the loss, if at the time when they were stated they affected injuriously the estimate of the risk; for the essence of a misrepresentation lies in the fact that it obtains for the party who makes it, either the bargain itself or some advantage in the bargain.<sup>1</sup> It has also been held that a misrepresentation avoids

comes under no obligation to pay, this would vitiate the policy. The courts in this country would say that this was a fraud, not on the ground that the misrepresentation affects the nature of the risk, but because it induces a confidence without which the party would not have acted."

<sup>1</sup> Anonymous case, Skinner's Rep. 327. Upon evidence in an action upon a charter-party, the case was, that J. S. insured for him and such who should have goods upon such ship; and A. B. brought an action upon this charter-party, and made averment he had goods upon the ship, and held good. But per *Holt*, C. J.: "If the goods were insured as the goods of an *Hamburgher*, who was an ally, and the goods were the goods of a *Frenchman*, who was an enemy, this is a fraud, and the assurance is not good." *Lynch v. Hamilton*, 3 Taunt. 36. In *Lynch v. Durnsford*, 14 East, 495, an insurance was effected on goods on board ship or ships from the *Canary Islands* to *London*; and at the time the assured's agent, who effected the policy, knew that one of the ship or ships was named *The President*; and at the same time there was a paper or communication stuck up at *Lloyd's*, that "*The Howard, Marsh*, arrived off *Dover* from *Teneriffe*; sailed 24th ult.; on the 27th, off the *Salvages*, fell in with *The President, Owens*, from *Lanzarote*, deep and leaky"; but the agent did not communicate his knowl-

edge of the ship's name to the underwriters. Held, that the policy was thereby avoided, though the intelligence afterwards turned out to be false. Lord *Ellenborough* held: "The question is, whether the assured's agent was bound to communicate to the underwriters a material fact within his own knowledge, as coupled with the report made, relating to the supposed risk they were about to insure, which report afterwards turned out not to be true. There is no case, perhaps, exactly like this in species, but others have been decided, involving the same principles, that the assured is bound to communicate to the underwriters everything material to the risk within his knowledge at the time. Here, coupling the peculiar knowledge which the agent had of the name of the ship on board of which the goods were loaded, with the information contained in the paper stuck up at *Lloyd's*, it cannot be said that the fact was not material to be communicated to the underwriters. With the knowledge of such a fact kept back from them, can they be said to have contracted upon equal terms? If the underwriters had had the knowledge possessed by the assured, it might have been a question with them whether they would have insured at all; or if they did, whether they would not have required an enhanced premium." See also *Fitzherbet v. Marther*, 1 T. R. 12.



the policy, although it relate to a matter concerning which no statement whatever needed to be made.<sup>1</sup> As, for example, the cost of the vessel, or particulars as to her structure or character, or of her place, or the voyage, which might affect the risk.

If the misrepresentation is made in reply to a specific question, the question of materialness is excluded<sup>2</sup>; on the ground that the insurers by asking the question imply that they think it material, and that it is their right to judge for themselves as to what is material to the bargain they are asked to make, and that the in-

<sup>1</sup> *Sawyer v. Coasters' Mutual Ins. Co.*, 6 Gray, 221. Action on policy of insurance for one year on the brig *Sussex*. When the policy was written the agent of the plaintiff, in reply to a question of the president of the defendant company, represented that she had arrived safely at a port in Ireland, and was clear of her cargo, when, in fact, she was just entering the harbor. Held, that the policy was avoided. See also *Lewis v. Eagle Ins. Co.*, 10 Gray, 508.

<sup>2</sup> That an inquiry renders truthful statement necessary, of that which otherwise need not be stated, appears to have been held in *Fort v. Lee*, 3 Taunt. 381, in which the vessel insured had sailed on the last day of April, the policy having been effected on the 24th of May following. It was contended that, as the broker did not state the day of sailing, which was a fact material to the risk, the insurers were not held. "But the court said, that if the underwriters had wanted to know whether the ship had sailed, they ought to have inquired, and unanimously refused a rule to set aside the verdict." It was held in *Popleston v. Kitchen*, 3 Wash. C. C. 138, that, unless he is questioned, the assured is not bound to communicate the age of the vessel, or where she was built, and that it is enough if he is prepared to vindicate his implied warranty as to the seaworthiness of the vessel, in case it is

questioned. *Ruggles v. Genl. Int. Ins. Co.*, 4 Mason, 83, settles the rule that the assured is not bound to disclose the fact that the risk has been declined by others, unless the information be particularly called for. See also *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; 3 Kent's Com. 286. In *Silloway v. Neptune Ins. Co.*, 12 Gray, 73, it was held that the condition of a vessel falling within the warranty of seaworthiness need not be represented to an underwriter at the time of obtaining insurance thereon, except in answer to inquiries; and the burden of proving misrepresentation in answer to such inquiries is upon the underwriter. *Bigelow, J.*, said: "We are not satisfied that any misrepresentation of the actual condition of the vessel was made by the assured. No doubt they were bound to answer all inquiries truly respecting the soundness of the vessel and her fitness to undertake a voyage, although these were embraced in the implied warranty of seaworthiness. The law, while it does not require the assured to make any statements or representations on such matters in the first instance, does exact that he shall answer all inquiries concerning them truly." *Dennistoun v. Mut. Ins. Co.*, 20 Me. 125; *Burritt v. Saratoga County Mut. Ins. Co.*, 5 Hill, 188.

sured, by answering the question, is stopped from denying that it is material.

It has been held that all intelligence received, and all rumors which have reached the assured, must be accurately stated by him; and that a misrepresentation of them would avoid the policy, although it was subsequently proved that they were wholly erroneous.<sup>1</sup> We should be inclined, however, to limit this rule to

<sup>1</sup> *Lynch v. Hamilton*, 3 Taunt. 36. It was held, in this case, that one insured is bound to communicate to the underwriters any intelligence he has which may affect his choice whether he will insure at all, and at what premium he will insure, whether in fact true or false. If a ship is advertised to be in danger, and the insured effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ships' names, this is a concealment which avoids the policy, although the rumor was false. *Mansfield*, C. J., said: "No doubt, upon established principles, a person insuring is bound to communicate every intelligence he has that may affect the mind of the underwriter in either of these two ways: first, as to the point whether he will insure at all; and second, as to the point at what premium he will insure." Thus, in *Walden v. La. Ins. Co.*, 12 La. 134, the insured was induced, by a rumor of an attempt to set fire to an adjacent ropewalk, to have his own house insured, and withheld this circumstance from the underwriters. The ropewalk was so near his house, that, if one had caught fire, the other would probably have been destroyed. Held, that this was a concealment of a fact material to the risk. *Durrell v. Bederly*, Holt, N. P. 283; *Beckwaite v. Nalgrove*, Holt, N. P. 288, cited 3 Taunt. 46. In *Seaman v. Fonnereau*, 2 Stra. 1183, the insured had received a report that the vessel had been seen in the night leaky, and had disap-

peared the next day. The concealment of this fact was held to avoid the policy, though the report proved to be false, and the ship was afterwards lost by capture. In *Burr v. Foster*, 2 Dane, Abr. 122, insurance was effected in Boston on horses, from New London to Barbadoes, in the brig *Aurora* of Hartford. Three months after the vessel sailed, a captain of a vessel arrived at New York reported that he saw the brig *Deborah* at Hartford, a wreck, in latitude 24 N. In consequence of this report, the underwriters in New York refused to take the risk, and insurance was then obtained in Boston, the underwriters there not knowing of these facts. The captain described the wreck as the *Deborah*, a half-rigged brigantine, one hundred and fifty tons, no head, cabin not painted. The *Aurora* was a full-rigged brigantine, one hundred and eight tons, figure-head, and cabin painted. No evidence was produced that there ever had been a vessel in Hartford called the *Deborah*. Held, that the underwriters should have been informed of the report. See *De Costa v. Scandrett*, 2 P. Wms. 170; *Lynch v. Dunsford*, 14 East, 494; *Hoyt v. Gilman*, 8 Mass. 336. But if a fact be such that it cannot affect the risk, but only the underwriter's estimate of it, as in the case of *Sibbald v. Hill*, *ante*, p. 411, n. 2, although a false representation with regard to it would defeat the policy, it seems that a concealment of it would not. *Lexington Ins. Co. v. Paver*, 16 Ohio, 324. In

cases where there was something of actual fraud. If the assured, in possession of such intelligence and rumors, honestly believed them to be entirely without foundation, and in fact they are, and withheld them, for this reason only, we doubt whether the insurers would be discharged. It might, however, be said, even in this case, that he was bound to communicate them to the insurers, that they might judge for themselves as to their truth.<sup>1</sup>

*Haywood v. Rogers*, 4 East, 590, the ship had been surveyed at Trinidad on account of her bad character. The survey gave her a good character. As there was a warranty of sea-worthiness, it was held, that whatever formed an ingredient of that need not be disclosed, although it might have enhanced the premium. In *Ruggles v. Gen. Int. Ins. Co.*, 4 Mason, 74, 83, the insured's offers of higher premiums had been refused. *Story, J.*, said: "But he was not bound to communicate his other offers, or his fears or hopes, but only to communicate any facts which justified them; and the material fact as to time was stated. Underwriters must judge for themselves as to matters of opinion." See *Shootbred v. Nutt*, Park, Ins. 300; *Carter v. Boehm*, 3 Burr. 1905; *Rickards v. Murdock*, 10 B. & C. 527; *Beckwith v. Sydebotham*, 1 Campb. 116; 2 Duer on Ins. 388 *et seq.*, where this question is considered with great ability.

<sup>1</sup> In *Bell v. Bell*, 2 Campb. 475, the insured had received information, by letter, that all vessels arriving at Riga were ordered to send their letters to St. Petersburg, and that this order "had produced a great sensation on account of the detention which it would occasion the vessels; and that the *Rising Sun* (the vessel insured) must share the same fate." The letter was not shown to the underwriter, but the fact was communicated that the ship's papers had been sent to St. Petersburg for examination. Lord *Ellenborough* said: "The assured are only bound to communicate facts.

The broker was not bound to communicate the sensations and apprehensions which that fact produced at Riga." But in many cases expectations or belief must be communicated, if they would lead to inquiry, or to an inference of fact, so as to affect the underwriters' estimate of the risk. In *Willes v. Glover*, 4 B. & P. 14, the shippers wrote the consignees: "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can for my account." The captain did not sail until more than twenty days after the letter was written; but the omission to communicate this letter was held fatal to the policy. See also *Marshall v. Union Ins.*, 2 Wash. C.C. 857; *Ely v. Hallet*, 2 Caines, 57. In *Marsh v. Muir*, 1 Brev. 133, it was held that the insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general impression of danger as must enhance the premium of insurance. But a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become ground of condemnation in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.

It is obvious from what we have already said, that representations in the law of insurance are of three classes: one, where there is positive affirmation of a specific fact; another, where there is only a statement of belief or opinion, and such a representation as this would not avoid the policy if the assured held that belief or opinion; and the third is, where intelligence or rumors have reached the insured, which, whether true or false, would influence the insurers in making the policy, or fixing the premium, and ought therefore to be fully and correctly communicated. Through all these classes the necessity of materiality exists, and distinguishes representations from warranties. And even actual fraud, intended and practised by the insured, might perhaps not defeat the policy, if it were certain that the insurers were not defrauded by it.<sup>1</sup> We say certain, for if the

<sup>1</sup> This is on the ground that if no wrong be suffered, no damage ensues. *Baker v. Corey*, 19 Pick. 496; *Morgan v. Bliss*, 2 Mass. 111, in which the court said: "This was an action for a fraud, and the evidence was clearly insufficient to support the charge. Here was no evidence of any conspiracy between the two defendants, nor any proof of the plaintiffs ever having released their demand on J. B. (and no reason shown for not producing such proof), or of their having in any other way given a valuable consideration for the note; and without such evidence, what damage do they show themselves to have sustained? Nonsuit will not be set aside." See also *Salem India-Rubber Co. v. Adams*, 23 Pick. 256; *Anderson v. Burnett*, 5 How. Miss. 165. In *Otis v. Raymond*, 8 Conn. 413, A, being indebted to B, and being also in embarrassed circumstances, and on the eve of absconding, put into the hands of C certain notes, to secure B and the other creditors of A; C, on receiving such notes, promising to deliver immediately to B a sufficient amount thereof to satisfy his claims, or in some other way to pay and secure him. After A had absconded,

B, who was ignorant of this arrangement, inquired of C whether A had made any provision for him; whereupon C, "wickedly contriving and intending to deceive and defraud" B, falsely declared to him that A had left no effects in C's hands for the benefit of B, and had made no arrangement with C for the payment or security of B's claim, in consequence of which B, after having commenced a process of foreign attachment against C, as the garnishee of A, was induced to accept a share of one of the notes so left with C apportioned among B and the other attaching creditors, the avails of which were about one half only of B's claim against A, the residue of that claim being lost. In an action on the case, brought by B against C, stating these facts, it was held that the declaration was insufficient; for the alleged fraud consisted in the suppression or misrepresentation of facts which the defendant was under no legal obligation to communicate to the plaintiff; and no damage resulted to the plaintiff, from such suppression or misrepresentation, because it had no tendency to produce any act or omission to the plaintiff's prejudices.

insured utters a falsehood with intent to assist him in procuring an insurance, or in getting it on lower terms, and does in fact procure an insurance on satisfactory terms, there is at least a strong presumption that the insurers were influenced as he presumed they would be. If the insured could show that the insurers distinctly rejected his statement, and made the policy on precisely the same terms as if he had not made the statement, it might then be said that the statement, which it must be remembered was not a warranty, was not material. We are, however, by no means sure<sup>1</sup> that he would not be estopped from denying that they were influenced by assertions which he had made, in the belief that they would exert an influence. Still, it might be open to the insured to rebut this presumption by sufficient evidence that the insurers were wholly uninfluenced by his falsehood, either in making the policy or in its terms. We have seen that representations may be by words spoken or written outside the policy, and there are cases which hold that a representation, or its equivalent, may be implied by the policy itself.<sup>2</sup> Thus, if the insurers stipulate to return five per cent for convoy, this was held by Lord Eldon<sup>3</sup> to imply, not a

<sup>1</sup> See preceding note.

<sup>2</sup> The general rule of law is, that every statement contained in a policy is to be regarded as a warranty. *Bean v. Stupart*, 2 Dougl. 11; *Kenyon v. Berthon*, 1 Doug. 12, note, where it is held that a statement is not a warranty, unless written on the policy. See also *Jennings v. Chenango Co., Mut. Ins. Co.*, 2 Denio, 75; *Glendale Woollen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Routledge v. Burrell*, 1 H. Bl. 254; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219. But it would of course be otherwise if it were agreed, in express terms, that a direct statement in a policy should be treated as a representation. 2 Duer on Ins. 644. So, statements of belief or expectation, though inserted in the policy, are to be regarded as representations only. In *Stewart v. Morison*, Millar on Ins. 59, the words "the vessel was expected to be loaded between the 13th and 20th of

September" were inserted in the policy. This was held to be a representation that the vessel had not, within the knowledge of the assured, been loaded before the 13th of September. Inferences drawn from statements on the face of the policy are frequently treated as representations. In *Hodgson v. Richardson*, 1 W. Bl. 463, 3 Burr. 1477, the insurance was from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage." This clause was held equivalent to a representation that the cargo was to be loaded at Genoa; and as it was in fact loaded at Leghorn, and the risk was thereby materially affected, the policy was held to be void. See *Reid v. Harvey*, 4 Dow, 97; *Seton v. Luce*, 1 Johns. Ca. 1, per Kent, J.; *Vandenheuvel v. United Ins. Co.*, 2 Johns. Ca. 451; *Palmer v. Warren Ins. Co.*, 1 Story, 360.

<sup>3</sup> *Reid v. Harvey*, 4 Dow, P. C. 97. The terms of insurance were, "on goods

warranty of convoy, nor even an assertion of convoy, but a belief in the probability of convoy. And where an insurance was from a certain port to another port, "the adventure to begin from the loading to equip for the voyage," Lord Mansfield held,<sup>1</sup> that this implied that the cargo was to be loaded at the port first named. It was quite certain that a representation must be construed by the plain and reasonable import of the words, and that it contains and implies all that is necessarily or reasonably to be inferred from it.<sup>2</sup> It is extremely difficult to lay down any rules which will suffice to determine as to any particular representation, whether it be material, or, in other words, whether it have so much tendency to induce the insurers to make the policy, or to make it on lower terms, that the law will consider it sufficient to avoid the policy.

In one case<sup>3</sup> Lord Mansfield says: "If he [the insured] states that as a fact which he does not know to be true, but only believes, it is the same as a warranty." He could not, however, mean this, because he could not have forgotten that the question of materialness is excluded when a warranty is broken; and he decides this case against the insured on the ground that "this was a *material* conceal-

by the Nancy, Captain Johnson, from Lisbon to Clyde, at a premium of ten guineas per cent, to return five per cent for convoy and arrival." Lord *Eldon* held: "I think the general understanding would be, that the vessel so insured would sail with convoy, though some might possibly sail without, and the underwriter says, 'I take the risk altogether, with the chance of the vessel sailing with convoy.' But if he had not this alternative, and knew that she was to sail or had sailed without convoy, he might not take the risk at ten guineas, as he only took it at ten guineas with the chance of her sailing with convoy, though in that case, and on arrival, he was to return five per cent, so that he takes the risk altogether, upon the understanding that there may be a sailing with convoy, whereas, without that alternative, he might not take the risk at ten guineas, or might not take it at all."

<sup>1</sup> *Hodgson v. Richardson*, 1 W. Bl. 463, 3 Burr. 1477. The case was that the ship was insured at and from Genoa, &c., her cargo consisting of perishable commodities. She was loaded at Leghorn, and lay at Genoa for five months, during which time the insurance was effected. Lord *Mansfield* held: "The ship is insured at and from Genoa to Dublin, the adventure to begin from the loading to equip for this voyage. This plainly implies that Genoa was the port of loading."

<sup>2</sup> In *Sibbald v. Hill*, 2 Dow, P. C. 263, the representation was contained in letters. Lord *Eldon* said: "The letters must be taken in their fair and obvious constructions, and an attempt, by nice criticisms, to show that they were susceptible of a different meaning will not do." See *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506.

<sup>3</sup> *Fillis v. Brutton*, Park on Ins. 414.



ment and misrepresentation." There are other cases in which there is the same confusion of language.<sup>1</sup> But when judges say that a representation is the same as a warranty, or is equivalent to a warranty, they must be understood to mean only that a false representation has the same effect or an equal effect as a breach of warranty in defeating the policy. For there are important and perfectly well-established differences between warranties and representations.

In one case it was represented to the insurers that the vessel was seen "safe in the Delaware on the 11th of December," when in fact she had been lost two days before that date. The insured made the assertion with entire innocence, and from a mistake caused either by erroneous information or erroneous computation of time.<sup>2</sup> Lord Mansfield and the other judges of the King's Bench here drew a distinction between the representation of a fact and the statement of an opinion or belief; holding apparently that no statement of opinion or belief, however erroneous, would avoid a policy, if it were made honestly. But if he states a fact, or, in the words of Lord Mansfield, "when the assured repre-

<sup>1</sup> *Vandenhoevel v. The United Ins. Co.*, 2 Johns. Ca. 127, opinion by *Radcliff, J.*

<sup>2</sup> *Macdowall v. Fraser*, 1 Dougl. 260. Action on a policy of insurance on the ship "Mary and Hannah, from New York to Philadelphia." At the time when the insurance was made, which was in London on the 30th of January, the broker represented the situation of the ship to the underwriters as follows: "The Mary and Hannah, a tight vessel, sailed with several armed ships, and was seen safe in the Delaware on the 11th December, by a ship which arrived at New York." In fact, the vessel was lost on the 9th of December. Lord *Mansfield* said: "The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the

difference between the fact as it turns out, and as represented, must be material. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment that the ship was seen in the Delaware on the 11th of December. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial when she was seen in the Delaware, or in what condition; but why did the assured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances upon ships at a great distance, their being safe up to a certain time is always considered as a very important circumstance; I am of opinion that the representation concerning the day was material."



sents a fact without knowing it to be true, he takes the risk of it upon himself.”

We have no doubt that the distinction is a sound one; for when the insured states only an expectation or opinion, he does state a fact by implication, that is, that he believes what he says to be true. And if this fact be as he asserts, that is, if he does so believe, this justifies his statement. It is otherwise, however, when, not content with stating an opinion, he states that the fact itself is so. This case is the more interesting because the court explicitly discards the question of fraud; and it may be regarded as the beginning of that course of adjudication which has, as we think, established the rule that a material misrepresentation, although innocent, defeats the policy. Sometimes, however, the representation may seem to be positive, and yet would be construed as only the expression of an opinion; and therefore, however material and untrue, it would not avoid the policy if made honestly. In a case which carries this construction very far,<sup>1</sup> where the broker who effected the insurance represented that the vessel would sail in a few days, and she did not sail until about a month after the time, and this delay was proved to be very material, Lord Ellenborough instructed the jury to “consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from *probable* expectation; and that if the representation was made *bona fide*, it should not conclude him.” A verdict was rendered for the plaintiff; and on a motion for a new trial, the court sustained the instruction of the Chief Justice, saying, “that a representation as to the time of the ship’s sailing, made by the owner of goods on board, must, from the nature of the thing, be considered as a probable expectation, *he having no control over the event.*”

We consider this case of peculiar interest, because it draws an important distinction which is not, so far as we know, asserted in any other case, but which seems to us in itself reasonable and just. From the words we have italicized, it must be inferred that the ground of the decision was that the words were used by one who must depend upon others for their truth, and had no power himself to make them true. If, therefore, the same words had been used by the owner of the vessel, who, it might be presumed, could

<sup>1</sup> Bowden v. Vaughan, 10 East, 415.

have determined the sailing of the vessel by his own directions, they would have bound him. We think, however, that the owner might rebut the presumption, that if he could prove that he used the words honestly, and that the vessel was where his directions could not reach her, and that he had therefore no power to control her sailing, we should say that these words would bind him no more than they would the shipper of goods, because one party had as much power to make the words good as the other.

The rule we should draw from the case is this ; that if the insured states only his belief of a certain fact, and has it entirely within his power to make that belief conform to the fact, he would be held in the same manner as if he asserted the fact itself. It should be added, that, if the insured expresses only an opinion concerning a material fact, he is not justified merely by holding this opinion, or by a mere ignorance of the truth, if he had sufficient means of information concerning it, and made no use of them, through negligence ; or, in other words, if he ought to have known the truth. If he wilfully avoided the means of information, this would, of course, impart to the misrepresentation the taint of fraud.<sup>1</sup>

An important difference between a representation and a warranty consists in the requirement that a warranty shall be strictly complied with, while it is enough that a representation is substantially

<sup>1</sup> *Biays v. Union Ins. Co.*, 1 Wash. C. C. 506. The same rule applies if the ignorance be owing to the negligence of the assured. *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170 ; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. 256. The same is true if a party, having given orders for insurance, receives information affecting the risk, and does not use reasonable diligence to communicate it. *Watson v. Delafield*, 2 Caines, 224, 1 Johns. 150, 2 Johns. 526 ; *Batchelder v. Jones*, Sup. Jud. Ct. Mass., 2 Dane's Abr. 123 ; *Greive v. Young*, Millar, Ins. 65 ; *Green v. Merchants' Ins. Co.*, 10 Pick. 402 ; *Byrnes v. Alexander*, 1 Brev. 213. So, if the party applying for insurance is ignorant, through negligence, either his own or that of insured, the underwriter is discharged. In *Wake*

*v. Atty*, 4 Taunt. 494, a broker effected a policy at Lloyd's at a time when a letter lay on his table at the Coal Exchange unopened, announcing the ship's loss. Held, that the jury were warranted in finding that this was no such want of diligence as avoided the policy. In *M'Lanahan v. Universal Ins. Co.*, Mr. Justice *Story* said : " The case of *Wake v. Atty* lays down no new rule, but merely applies the old one to circumstances somewhat nice and peculiar in their presentation." In *Fitzherbet v. Mather*, 1 T. R. 12, the letter was written by an agent applying for insurance, but before it was sent by the post, he received intelligence that the vessel was lost, and did not communicate it. Lord *Mansfield*, C. J., said : " This policy was effected by misrepresentation, and that

complied with.<sup>1</sup> If, on the whole, the representation exhibits the risk, in reference to the facts stated, fairly, or in such wise as to make it as great a risk as it would seem to be had the statement been more minutely accurate, this is not a misrepresentation which would defeat the policy. Here, as so often elsewhere, in the law of insurance, it is impossible to draw an exactly defining line between substantial compliance and non-compliance. Our notes,

misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now, whether this happened by fraud or negligence, it makes no difference, for in either case the policy is void. See *Andrews v. Marine Ins. Co.*, 9 Johns. 32; *Green v. Merchants' Ins. Co.*, 10 Pick. 402.

<sup>1</sup> *De Hahn v. Hartley*, 1 T. R. 343, S. C., 2 T. R. 186. In this case, which turned on the construction of a warranty, Lord *Mansfield* said: "There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered, but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail until the second, the warranty would not be complied with. A warranty in a policy of insurance is a condition or contingency, and unless that is performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with. Now, in the present case, the condition was the sailing of the ship with a certain number of men, which not being complied with, the policy is void." And *Ashurst*, J., in the same case, said: "The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so. In *Pawson v. Watson*, Cowp. 785, the case was: The broker who made the insurance showed

to some of the underwriters a paper, detached from the policy, containing instructions relative to the force that the ship was to sail with, viz. twelve guns and twenty men. The ship actually sailed with ten guns and six swivels, and with sixteen men and seven boys besides passengers. The court chiefly went upon the distinction between a warranty and a representation, and held that, in this case, the instructions, though in writing, yet being on a separate paper from the policy, were only a representation, and as they had not been departed from fraudulently, nor in a manner detrimental to the underwriters, the policy was in force against them. In *Suckley v. Delafield*, 2 Caines, 222, a representation made at the time of effecting the insurance was, that the vessel would sail in ballast. The master carried with him a trunk containing shoes, and ten barrels of gunpowder, which were duly entered in the custom-house at Cape François, St. Domingo, and the ship was soon after seized for importing gunpowder contrary to a local regulation. On the trial it was objected by the defendants that it was a breach of the representation to carry the gunpowder; but *Kent*, C. J., held: "We are of opinion the representation of sailing in ballast was merely stating the vessel would not be exposed to the sea perils attending a loaded ship. It was made in a time of profound peace, and, in the present instance, was substantially performed."

however, will show in what cases this line has been drawn, and on what principles.<sup>1</sup> On the other hand, it is true that a literal compliance with a representation is not sufficient, if it be not a substantial compliance.<sup>2</sup> A very good illustration of this is afforded

<sup>1</sup> It was held in *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. 114, where the representation was that the factory was examined every day after work, and that a cask of water and buckets were kept in each story, that an occasional omission to examine, happening by accident, and not sanctioned by the superintendent, might not amount to a non-compliance. And in *Daniels v. Hudson R. Ins. Co.*, 12 Cush. 416, it was represented that a cask of water was kept at hand. It was held, that having a cistern or reservoir of sufficient capacity would be a substantial compliance, and that the keeping of a cask of small size would not, though literally agreeing with the representation. See also *Hall v. People's Ins. Co.*, 6 Gray, 185, in which a building was described as being occupied as a hotel; it was held that the using of it by the tenant as a house of ill-fame did not defeat the policy, this use being without the knowledge and consent of the owner of the premises. *Jennings v. Chenango Mut. Ins. Co.*, 2 Denio, 75, in which part of the building insured as a grist-mill was used as a carpenter's shop, the risk being enhanced by the use, it was held that the policy was void. In *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, the building was represented to be a stone mill covered with wood. The gables were of wood. This was held not to be a misrepresentation, if the rate of premium was not thereby enhanced; but having a cooper's shop in a building described as a flour-mill was held not to be a compliance with the representa-

tion. *Harris v. Col. Ins. Co.*, 4 Ohio, State, 285.

<sup>2</sup> *Alsop v. Coit*, 12 Mass. 40. This action was upon a promise to procure insurance. The plaintiff wrote to the defendant, requesting him to procure insurance on a vessel bound from Boston to St. Domingo. The letter stated that "the vessel would sail as soon as the frigates, calculating to take advantage of their protection," there being then frigates in the harbor of Boston preparing for sea. The vessel sailed on the 19th of April, before the frigates were ready, and was captured on the 20th. Mr. Justice *Jackson* held: "The representation contains in effect a statement of what he had ordered, or intended to order, in respect to the time of the vessel's sailing. The vessel was to sail 'as soon as the frigates, calculating to take advantage of their protection.' This representation was made in order to reduce the premium, and must have had that effect. It ought then to be substantially complied with. The underwriters could not suppose, when signing such a policy, that the vessel had sailed two days before the letter was written; and that the frigates, which were to protect her, were still in port. There appears to have been no dispute at the trial as to the facts relating to this point. It was manifest that the representation had not been complied with, and there was no attempt to prove that what had been done was equally beneficial to the insurers. The only question seems to have been on the legal effect and operation of the facts proved; and the jury

by the case where the representation was that the ship would "sail as soon as the frigates." She did in fact sail before them, and, of course, sailed "as soon," but the terms of the representation, and the circumstances of the case, made it clear that the insured intended to say to the insurers, and that they must have understood him to mean, that the ship would sail with the frigates, and so have their protection. The non-compliance was therefore equally complete, whether she sailed before or after. In this case the vessel was captured, and would have been much less exposed to this risk had she sailed with the frigates. The decision, however, is put entirely upon the ground of the misrepresentation.

were instructed that such a misrepresentation would have avoided the policy, if one had been made according to the plaintiff's instructions; from which it followed of course that the plaintiff could not recover damages against the defendant for not procuring such insurance. The directions to the jury were undoubtedly correct, and there must be judgment on the verdict." And in *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. 114, *supra*, *Shaw*, C. J., remarks: "The application and the various answers contained in it (the policy of insurance), being termed 'representations' in the policy, are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations in requiring that the facts stated shall be substantially true and correct, and, so far as they are executory, that they shall be substantially complied with; but not like warranties, in requiring an exact and literal compliance. It is enough, therefore, if the statements relied on as the basis of the contract are made in good faith and without intent to deceive; that they are substantially true and correct as to existing circumstances, and sub-

stantially complied with, so far as they are executory and regard the future. . . . But in construing these representations, both as to existing facts and as to future precautions to be taken, a mere literal conformity and compliance would not be sufficient. Good faith, as well as the terms of the contract, requires that it shall be a full and just, as well as a true, exposition. These answers are to be construed in reference to the requirements of the office, and specified on the back of the application, and referred to in the questions; and they are to be so construed as to meet these requirements, and conform to them, when it can be done consistently with the terms of the answers. For instance, the answer to No. 13 states that water-casks are placed in each room. This answer would be literally true, if a small vessel having the shape and bearing the name of a cask were so kept; but it would not be a full and just statement, nor a substantial compliance with the undertaking of the assured. That undertaking requires a substantial compliance, by keeping a cask of water of a size adapted to the required security, and holding a sufficient quantity to extinguish a sudden fire, beginning to kindle in such a story."

From the definition of representation, and all the reasons of the law on the subject, it is obvious that where the error of the representation makes the risk less favorable to the insured than it was in fact, and consequently could have given the insurers no reason for declining the insurance, or for raising the premium, they could not be injured by it nor take advantage of it in their defence.

If the representation is ambiguous, and may be understood equally, or nearly equally, in two senses, one of which would favor the insured more than the truth would justify, and the other would not, this ambiguity may be intended or not intended by the assured. If intended, it must be dishonest, for its purpose must be to lead the insurers to adopt the meaning most favorable for themselves; it would then be fraudulent, and would defeat the policy.<sup>1</sup> And this case may be sufficiently covered by the requirement that the insured shall communicate intelligibly and distinctly whatever he knows that would influence the terms of the bargain.<sup>2</sup> So if, with no wrongful intentions, the insured makes an ambiguous statement, and afterwards knows that the assurer understands it erroneously, and more favorably than he should for the insured, we have no doubt that he would be held as giving his assent to this erroneous interpretation, which would make it a misrepresentation. The insurers are undoubtedly bound to make all reasonable inferences from the facts disclosed to them, and cannot charge the insured with misrepresentation, because he did not give all the particulars he knew, if he did tell them so much as would fairly suggest to them the residue, or put them on inquiry.<sup>3</sup> This brings

<sup>1</sup> See p. 402, n. 3, *supra*.

<sup>2</sup> See p. 408, n. 1, *supra*.

<sup>3</sup> *Freeland v. Glover*, 7 East, 457.

In this case a ship was on an African voyage, the common duration of which is several months, and sometimes a twelvemonth or more; arrived on the coast in August, 1799; and in February, 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others, by means of which and a fever the crew were reduced to five, and all

those sickly, and not a man to be procured at hand; that they had been plundered of their clothes, &c., that their cabin stores were exhausted, and that they did not know what to do. A second letter, dated 21st April, from Gaboon River, mentioned their arrival there on the 24th March; that the natives, finding them weak-handed and their goods taken from them, did as they pleased; that they had then nine men on board, but their provisions run very low; that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest, and to



us to the question, what would be the effect of a representation which was ambiguous, but honestly made; and the insurers un-

sail at the end of the next month. An insurance was effected in September, 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of Africa," &c. Held sufficient that the last letter truly stated the then condition and circumstances of the ship; which, though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances; the second letter, both in its terms and contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of the former difficulties in part subdued, and to the extent truly stated in the second letter, would have varied the risk; and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship on the coast was only on the 24th of March, when she was stated to have arrived in Gaboon River, and to have had much of her homeward-bound cargo on board on the 21st April, and was expected to sail with the remainder by the end of May, Lord *Ellenborough* said: "In every case of this sort it is necessary that there should be a full and fair disclosure of all the material circumstances affecting the actual state and condition of the ship at the time of the insurance effected. Here, however, the assured disclosed everything which he knew as to the existing state of the ship at the time; it was a true statement of its then actual situation; and suggests a former communication, so as to put the underwrit-

ers upon further inquiry if they thought it material. The ship was stated to be weak-handed, which was the material fact, and whether that had been before occasioned by the sabre or by sickness could not then signify. The former letter would not have communicated in substance more than the underwriters had information of. There was therefore no concealment of anything material." In *Court v. Martineau*, 3 Dougl. 161, two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on a Sunday, the owner sent a despatch to his agent in London, stating the fact, and expressing fears as to the other ship. The express reached the broker on Tuesday, and on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel at a premium of fifty guineas per cent, without communicating to the underwriters the fact of the express. It was held, that this was not a concealment which vitiated the policy. Opinion by *Mansfield*, C. J.: "On the Wednesday before the post came in, the plaintiff underwrote this policy at fifty guineas per cent. This was emphatically informing the plaintiff that the ship had not arrived, and that the defendant did not believe she had arrived at that moment. Under any other circumstances, such a premium could not be given. The plaintiff alleges that he has since discovered that the broker received a letter by express from Liverpool despatched on the Sunday, with information that the ship had not arrived, and that the defendant feared she might be



derstood it in a sense different from that intended by the insured, and he did not know their mistake?<sup>1</sup> We should say, from the

retaken. The letter also stated that if she arrived on the Monday, the defendant would send another express. We lay out of our consideration the ostensible letter intended to be exhibited to the underwriters, for in fact it was never shown to them. The sole objection therefore is, that the broker did not communicate the fact of the express. Now it must have been known that a merchant in Liverpool so circumstanced would send an express upon the ship's arrival, since the whole of the premium paid after that event would be thrown away. If the underwriter had wished to know by what means the broker acquired his information that the ship had not arrived, he should have made inquiry; but he waived the inquiry by putting no questions to him, though they naturally arose from the subject. By the course of the post from Liverpool, the underwriter must have known that the entry of Tuesday at Lloyd's did not arrive by post. The broker said nothing to mislead. We are all of opinion that there was no concealment, and that it was owing to himself that the underwriter did not receive the information which he now complains was withheld from him." In *Friere v. Woodhouse*, 1 Holt, N. P. 572, Mr. Justice *Burrough* said: "What is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence, may learn from the ordinary sources of information need not be disclosed." See also *Littledale v. Dixon*, 1 B. & P., N. R. 151.

<sup>1</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506. Insurance founded on a representation that the parties applying

therefor were native-born citizens was obtained by the plaintiffs from the defendants. The words of the representation were these: "Insurance is desired against loss by capture only; the owners are already insured against dangers of the sea, and all other risks except those of capture. You have already had a description of the ship from Messrs. C. & D., and which, I presume, is correct. I think it proper to mention that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned; but the first gentleman thinks there is so little danger from capture, that in his letter from Lima he expressly directs that no insurance be made for him against that risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans." The ship was captured by a British man-of-war, taken to Halifax, and condemned; by her papers it appeared that part of her cargo was Spanish property. On the ground of misrepresentation, payment was refused of the policy. Mr. Chief Justice *Marshall* held: "If the question on which the court was divided be considered literally, the answer must undoubtedly be, that the letter contained no averment that no other person than Livingston, Gilchrist, Griswold, and Baxter were interested in the return cargo of the *Herkimer*, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the court concerning its contents. But the real import of the question is this: Is the language

reason of the thing, that this would not have the effect of a misrepresentation. It must be supposed, in such a case, that the ambiguity would be apparent on due consideration. And the insurers should not be permitted to defend themselves, either by their want of care or by their neglecting to ask for an explanation and have all ambiguity removed. We suppose this doctrine to have been held by at least a majority of the judges of the Supreme Court of the United States. But the effect of this is greatly lessened by the fact that the language of Chief Justice Marshall might lead to an inference that he thought otherwise. After all,

of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return cargo? If it does amount to such an averment, then it is a representation; and if it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it. Upon reading the letter on which this insurance was made, the impression would probably be that the four persons named in it were the sole owners of the return cargo of the *Herkimer*. The inference may fairly be drawn from the expressions employed. Such was probably the idea of the writer at the time. The writer, however, might have, and probably had, other motives for his allusion to other owners than to convey the idea that there were no others. The premium might, in his opinion, be affected in some measure by stating the little fear of capture which was entertained by others, and especially by that owner who was supercargo. If, however, it was not supposed by Mr. Gilchrist that the persons named in his letter were the sole owners of the cargo, or if, in fact, they were not the sole owners, he has expressed himself in so careless

a manner as to leave his letter open to misconstruction, and, in the opinion of some of the judges, to expose his contract to hazard in consequence of it. But that part of the court which entertains this opinion is also of opinion that the letter ought not to be construed into a representation of any interest to grow out of the voyage, distinct from actual ownership of the cargo. 'The owners,' says Mr. Gilchrist, 'are already insured against the dangers of the sea,' &c. His application was for the owners; and when he proceeds to state that others were concerned, he must be understood to say that they were concerned as owners. Consequently, if the letter implies an averment that he has named all the owners, it implies nothing further, and ought not to be construed into a representation that there were no other persons interested in the safe return of the cargo. Others are of opinion that to constitute a representation, there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insured ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion the majority of the court is understood to concur."

an ambiguity of exact equality in its two meanings is scarcely possible; and Marshall may only have meant that, in the case before him, the inference suggested to the insurer, and on which he acted, "was fairly to be drawn from the expressions employed, and was probably the idea in the mind of the writer"; and that, therefore, he was responsible for it. This case does not require us to suppose that he would hold the insured as defeating his policy by every ambiguity in his representation, which led the insurers into a mistake without fault on his part.

A representation of future facts may be only an expectation, or it may be a promise;<sup>1</sup> an expectation that such a thing *will* happen, or a promise that it *shall* happen. When it amounts to this promise, we know no reason to doubt that it binds the insured.<sup>2</sup> We have seen that a distinction has been taken between such a representation from a party who has no power to make his words good, and one from a party who can make the fact conform to his representation. At the same time, this distinction in favor of the party who has no power over the fact should be limited to a

<sup>1</sup> In the case of *Pawson v. Watson*, Cowp. 785, the representation made by the broker, in effecting a policy on the ship, was in these words: "She mounts 12 guns and 20 men." Although affirmative in point of form, it is plain that the representation was promissory in its meaning; for, when the policy was effected, the ship, which, as appears by the report, did not sail for a month afterwards, had not a single gun or a single man on board; so that the representation, unless construed to refer to a future event, was false when made. The whole judgment of Lord *Mansfield* plainly shows that he took it to be, what undoubtedly it was, not a mere assertion of the actual force of the vessel at the time, but a stipulation that she would sail with the armament described on the voyage insured.

<sup>2</sup> In *Dennistoun v. Lillie*, 3 Bligh, P. C. 202, it was stated that the vessel insured "will sail on the 1st of May," but in point of fact she sailed on the

20th of April, and on the 11th of May was captured by a privateer, but this fact was unknown at the time the insurance was effected. It was contended, on the trial in the House of Lords, by the plaintiff's counsel, that the statement of a future event, such as a day of sailing, could be no more than an expectation, and therefore could not avoid the policy unless fraudulent. Lord *Eldon*, however, held that the policy was avoided by the misrepresentation. "There is no difference," said this distinguished judge, "between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy, if the fact misrepresented be material to the risk." This case, we see no reason to doubt, may be considered explicit authority for the position that a positive promissory representation of a material fact will, if false, avoid the policy, though no actual fraud can be alleged.

case where he uses words which, in connection with the circumstances, may be fairly construed as a mere expression of expectation. We see no reason for holding that, if he sees fit to use words which mean explicitly and undeniably a promise, he can escape from a responsibility for it; and we think this limitation is consistent with the case from which we drew this distinction.<sup>1</sup>

A representation of future facts may be entirely inconsistent with the policy itself; that is, it may represent that certain things will take place, and even promise that they shall take place, and the policy provide for inconsistent facts. Here the general rule must apply that evidence from without the policy cannot be admitted to vary the written contract. The law would infer conclusively that the first promise, although it entered into the negotiation, was not accepted by the insurers, and therefore did not enter into the written contract. As, if the representation was that the vessel would sail from A to B in ballast, and the insurance was on ship and cargo from A to B, or the representation was that the ship should sail from A to B, and the policy was on a much longer voyage, from A to C. The rule must be that no evidence of representation should be received which would so far alter the terms of the policy as to substitute one bargain for another; but this rule must be itself subject to the universal rule that fraud vitiates every contract; and, therefore, if such a representation was made with fraudulent design and effect, it would defeat the policy.<sup>2</sup>

In construing the words of a representation, the same principles must be applied that would be applied to the construction of the policy itself,<sup>3</sup> excepting so far as they are modified in the case of a

<sup>1</sup> *Bowden v. Vaughan*, 10 East, 415. It was held, in this case, that a representation to the underwriters, at the time of effecting a policy, by the owner of goods on board a ship, as to the time of her sailing, being made *bona fide*, upon probable expectation, does not conclude him. See *supra*, p. 420.

<sup>2</sup> *Simond v. Boydell*, Dougl. 268.

<sup>3</sup> *Ratcliffe v. Shoolbred*, 1 Park (8th ed.), 418. In this case the insurance was on goods on board the *Mary and Patty*, at and from the coast of Africa "to her last discharging port in the

West Indies." It was known to the assured, when the policy was effected, that the vessel had sailed from St. Thomas, on the coast of Africa, on the 2d of October previous; but the broker, by their directions, represented to the underwriters, "that the ship was on the coast on the 2d October," but said nothing of her sailing. The jury, under the direction of Lord *Mansfield*, found that the policy was void for misrepresentation and concealment. The representation was construed as meaning that the last intelligence left the ship

merely oral representation. We believe, however, that a representation, whether oral or written, must be construed, in reference to the usage of trade, by the same rules we have already considered when discussing the construction of a policy. In some instances this construction, by the help of usage, has been carried very far. In one case,<sup>1</sup> so far that a representation that the ship was to sail

on the coast, and that no advice of her actual sailing had been received. *Sibbeld v. Hill*, 3 Dow. P. C. 263. The representation was contained in certain letters of the assured, which, literally construed, did not assert the fact, the falsity of which was the alleged misrepresentation; but Lord *Eldon* said that "the letters must be taken in their fair and obvious construction, and that all attempt, by nice criticism, to show that they were susceptible of a different meaning would not do." *Kirby v. Smith*, 1 B. & Ald. 672. Here the representation was, that the vessel was at *Elaineur* on the 26th of July, all well; and Mr. Justice *Bayley* said: "The natural conclusion would be, that she was left there well at that time"; and the court adopted this as the true construction. In this sense the representation was false, and known to be so by the assured, for the vessel had left *Elaineur* six hours before the assured himself had sailed from thence in another vessel. As the circumstances of the case rendered the misrepresentation material, it was held to be fatal. In the cases of *Freeland v. Glover*, 7 East, 462, and *Court v. Martineau*, 3 Dougl. 161, the rule seems to have operated in favor of the assured. They illustrate the principle, that the underwriter is not permitted to aver the concealment of facts the existence of which, from the disclosure made to him, he ought to have inferred. See also *Friere v. Woodhouse*, 1 Holt, 572; *Littledale v. Dixon*, 1 B. & P., N. R. 151; *Alsop v. Com-*

*mercial Ins. Co.*, 1 Sumner, 451; *Irvine v. Sea Ins. Co.*, 22 Wend. 380; *Livingston v. Maryland Ins. Co.*, 7 Cranch, 535. It was held in *Wilson v. The Hampden Fire Ins. Co.*, 4 R. I. 159, that in construing the answers to the interrogatories in a printed application for fire insurance, although the proper meaning of the words used is to be first resorted to, yet the meaning attached by the applicant to them, clearly ascertainable from the connection in which he uses them, is to prevail over the proper meaning. *Ames, C. J.*, held: "Although the proper meaning of the words in question is certainly to be first resorted to, in order to understand the answer, it would be giving the proprieties of language the precedence over its purpose to allow those to prevail over the obvious meaning conveyed by an uneducated man, clearly ascertainable from what he said, taken in the connection in which he said it.

<sup>1</sup> *Chaurand v. Angerstein*, Peakes, N. P. 48. Assumpsit on a policy of insurance, on a ship from *St. Domingo* to *Nantz*, lost or not lost. The policy was effected in January, 1790, at which time a letter of the plaintiff's was shown to the underwriters, in which it was stated that the ship was to sail in October preceding. On seeing this letter, the policy was subscribed at a premium of £ 6 per cent. The vessel sailed on the 11th of October. On the part of the defendant, several merchants and commercial men were called, who testified that the expression "in

"in the month of October, preceding" was regarded as a fatal misrepresentation, although she actually did sail on the 11th; the insurer being permitted to prove that there was a well-understood usage among commercial men that "in the month of October" signified only some time between the 25th of that month and the 1st or 2d of November. We cannot doubt that a positive and definite representation will control a usage,<sup>1</sup> as if, in the case just cited, the representation had named

the month of October" was well understood amongst men used to commercial affairs to signify some time between the 25th of that month and the 1st or 2d of the succeeding month; and they said that had it been understood that the vessel was to sail between the 5th and 10th of the month, it would have made a difference of fifteen per cent in the premium, and many underwriters would not have subscribed the policy on any terms. Lord *Kenyon* held: "The party was in possession of these letters two months before the assurance was made. He might have sent copies of them without garbling any part of them, and then the underwriters might have judged for themselves. The evidence of underwriters is good evidence on this subject. In questions on the arts and sciences, the evidence of persons versed in those arts is daily admitted. Foreign laws are also matters of evidence, and yet all these are only the opinions of the witnesses." His lordship therefore left it to the jury to consider whether this was not such a material suppression of the facts as voided the policy. The jury found for the defendant. In the following term a rule to show cause why a new trial should not be had was obtained by the plaintiff, but upon cause being shown against this rule, it was discharged, and the verdict established.

<sup>1</sup> In *M'Gregor v. Ins. Co. of Penn.*, 1 Wash. C. C. 39, a usage to strike off

one third of the gross freight for charges, and to pay two thirds to the assured in a policy on freight, was held to be invalid. See also *Hone v. Mut. Safety Ins. Co.*, 1 Sandf. 137, 2 Comst. 285, in which *Sandford, J.*, said: "We find it clearly settled, that a general usage, the effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law." It was accordingly held, that a usage that a reinsurer should pay to the first insurer only so much of the sum reinsured as bore the same proportion to the property destroyed which was covered by the first insurance, as the whole reinsurance bore to the original insurance, was inadmissible. So a usage not to pay for a particular part of a vessel's apparel or furniture, as a boat when it is in a certain place on the vessel, is invalid if the place is that where it is usually carried. *Blackett v. Royal Exc. Ass. Co.*, 2 Crompt. & J. 244, 2 Tyrw. 266. Lord *Lyndhurst, C. B.*, in this case said: "Usage may be admissible to explain what is doubtful; but it is never admissible to contradict what is plain." In *Mercantile Mut. Ins. Co. v. State Mut. F. & M. Ins. Co. of Penn.*, 25 Barb. 319, the question arose as to the construction of the following order for reinsurance: "Reinsurance is wanted by the Mercantile Mut. Ins. Co. for \$ — on cargo on board of the ship *Great Republic*, at and from New York



the day of October on which she would sail, and she had sailed on that day, the usage proved would not have affected the policy. An established usage is to be taken as a part of a contract which is made in reference to it.<sup>1</sup> It may be said, therefore, that

to Liverpool, on the excess of risks the applicants may have over \$ 50,000, not to exceed \$ 15,000." At the time of the loss the plaintiffs had insured less than \$ 50,000 on the cargo of the ship, but they had risks on the freight and on the ship, which, when added to the amount on the cargo, amounted to over \$65,000. It was held that the defendants only engaged to insure the excess of risks on the cargo, and that evidence of the custom of the parties, and of the port of New York, in adjusting contracts of reinsurance, upon such applications, to regard the word "excess," in the application, as applicable to the whole amount of insurance at risk in or upon the vessel, and that premiums upon open policies had previously been adjusted and paid between the present parties upon that principle, was properly excluded, there being no ambiguity upon the face of the instrument. In *Rankin v. American Ins. Co. of New York*, 1 Hall, 619, the defendants offered to prove that, by the established usage of trade in the port of New York and in other ports, the master of the vessel is in all cases responsible for any damage sustained by the goods delivered by him to the owner or consignee, unless there has been an actual survey made on board the vessel by the wardens of the port or other officers, and on such survey the surveyors shall have found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea. That by similar usage, as between the assurers and the assured, the survey so made by the wardens is a document indispensable to be pro-

duced in order to charge the underwriters, and that the preliminary proof is deemed insufficient unless such document be exhibited as part of it. *Oakley, C. J.*, said: "By the terms of the policy in the present case, the defendants bound themselves to pay all damage to the property insured arising from perils of the sea; and the attempt now made is to introduce into the policy a condition that they shall not be responsible unless such damage is ascertained in a particular mode, and that too by the aid of third persons over whom the assured has no control. Such a condition would, in my judgment, vary the legal obligations of the defendants as ascertained by the plain language of the policy." See also *Bentaloe v. Pratt, Wallace*, 58. In *Illinois Mut. Fire Ins. Co. v. O'Neile*, 13 Ill. 89, it was held, that if the charter of an insurance company declared the contract to be void in case of additional insurance on a house, unless made with the consent of the company, evidence of usage that this applied to goods was not admissible.

<sup>1</sup> In one of the earliest cases on this subject, the court held that the clause, "warranted to depart with convoy," must be construed according to the usage among merchants, i. e. from such place where convoys are to be had. *Lethulier's Case*, 2 Salk. 443. See also *Mobile Mar. Dock & M. Ins. Co. v. McMillan*, 27 Ala. 77, in which Mr. Chief Justice *Chilton* said: "It is a rule of construction, settled by numerous authorities, that every usage of trade which is so well settled, or so generally known, that all persons engaged in that trade



it is a part of the policy, and that, if the representation is repugnant to it, the usage, as a part of the policy, must prevail over

may fairly be considered as contracting with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless, by the express terms of the policy, or by necessary implication, such inference is repelled." *Mason v. Skurrey*, cited *Park on Ins.* 191; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Noble v. Kennoway*, 1 Dougl. 510, in which Lord *Mansfield* said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself of it. It is no matter if the usage has been only a year." In *Da Costa v. Edmunds*, 4 Campb. 142, in which insurance was on "40 carboys of vitriol," these carboys were placed on deck and lashed to the ship's side. The vitriol was necessarily thrown overboard, and the underwriters refused payment of the policy, on the ground that they were not informed of the manner in which it was proposed to carry the goods. It appeared that the article was frequently carried on deck, but that it was likewise usual to stow them below, bedded in sand, in which condition they were considered safer. Lord *Ellenborough* "left it to the jury to say whether it was usual to carry vitriol on deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was that these carboys should be properly stowed in the usual manner. On the other hand, they were not liable if the goods were carried on the deck without such

a usage, or if they were not stowed there in a skilful and proper manner." In *Clark v. United Mar. & Fire Ins. Co.*, 7 Mass. 365, Mr. Justice *Seawall* said: "Questions are constantly arising on the operation and practical construction of policies of insurance; a species of contract liable to a great variety of incidents, and to be enforced in a great number of cases distinguishable from each other in the principles applicable to the decision. For rules to govern in these inquiries, there is a more than ordinary reference to established usages; and these, when ascertained and found to be suitable applications of general principles, are not inconsistent with them, or with the tenor of the contract to be explained and enforced, are considered as authoritative upon the parties. A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed indeed in the construction of contracts generally, where the conclusions are not avoided by special circumstances or stipulations." *Stevens v. Reeves*, 9 Pick. 198; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254, in which Mr. Justice *Washington* held: "The insurer must take notice of the usage of trade, but then it must be uniform and fixed." *Crosby v. Fitch*, 12 Conn. 410; *Trott v. Wood*, 1 Gall. 442; *Winsor v. Dillaway*, 4 Met. 221. In *Rogers v. Mechanics' Ins. Co.*, 1 Story, C. C. 603, the action was assumpsit on a policy of insurance, whereby the defendants insured \$10,000 on the bark *America* and outfits on a whaling voyage. The declaration alleged the necessity of throwing overboard a portion of blubber dur-

the representation. On such grounds as these, it has been doubted whether a representation could control a usage,<sup>1</sup> but such a doubt

ing a storm, and expenses of repairs made essential by it. It was stipulated that one fourth of the "catchings" should replace outfit consumed, and it was contended that blubber was included under this name; for the defendants it was argued that the term "catchings" did not cover the blubber. Evidence of custom was offered. Mr. Justice *Story* held: "As to the point, that by the usage or custom of trade in whaling voyages, blubber is not deemed an insurable interest, or entitled to, or liable for, contribution, there is no evidence whatever in this cause which, in legal view, establishes any such usage or custom in the port of New Bedford. Even if such a usage or custom were shown to exist in New Bedford, that would not be sufficient. The usage or custom of a particular port, in a particular trade, is not such a custom as the law contemplates to limit, or control, or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the State where it exists; and from its character and extent so notorious, that all such contracts of insurance in that trade must be presumed to be entered into by the parties, with reference to it, as a part of the policy. If the usage or custom be not so notorious, if it be partial or local in its existence or adoption, if it be a mere matter of private and personal opinion of a few persons engaged therein, it would be most dangerous to allow it to control the solemn contracts of parties who are not or cannot be presumed to know it or adopt it as a rule to govern their own

rights or interests. This court has nothing to do with the private opinions of witnesses, however respectable, upon matters which respect the interpretation of contracts. That is matter of law, which the court itself is bound to expound, in the absence of any usage or custom which impresses upon the words a peculiar and technical meaning. I own myself to be no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to, but which is now subjected by our courts to more exact and well-defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject; and therefore it should, I think, be admitted with a cautious reluctance and a scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts." In *The Schooner Reeside*, 2 Sumner, 567, the same learned Judge observes: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal nature. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some

<sup>1</sup> 1 Arnould on Ins. 544.

seems to us to rest upon a misapprehension of the effect of usage. It is received as a part of the contract, or permitted to give significance to a contract, only on the ground that it must have been within the contemplation of the parties. But a representation repugnant to the usage would take this ground away, by proving that they had not contemplated the usage, or had agreed to disregard it. The construction of representations respecting time is often important. It is a general rule that all representations must be taken to refer to the time of subscribing the policy.<sup>1</sup> They mean that the facts represented are then true;

technical, according to the subject-matter to which they are applied. But I apprehend it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." See also 3 Kent, Com. 260, and cases cited.

<sup>1</sup> *Freeland v. Glover*, 7 East, 457, fully stated on p. 425, n. 3, *supra*. *Edwards v. Footner*, 1 Campb. 530. This was an action on a policy of insurance on goods in *The Fanny*, from London to Hayti. The ship was captured by a French privateer with the goods on board, and the question was, whether the underwriters were discharged by a representation concerning her equip-

ment. It appeared that, about a week before the policy was signed, the names of the underwriters were put down upon a slip, when the broker stated to the defendant "that *The Fanny* was to sail with the *Hopewell* and *Young Roscius*, both armed ships, and that she was herself to carry ten guns and twenty-five men." There was no evidence of any conversation upon the subject having passed between the parties afterwards. In fact, *The Fanny* sailed by herself, and carried eight guns and seventeen men. Lord *Ellenborough* held: "If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited in argument, *Dawson v. Atty*, 7 East, 367, the vessel was stated to be an American when the slip was made out; but when the policy came to be signed, the brokers said generally, 'that it was an insurance on goods in the *Hermon*,' without describing her as of any particular country. There the first conversation was qualified and controlled by what followed. But here there is no evidence of any conversation upon this subject between the parties, subsequent to the statement that the ship was to carry ten guns and twenty-five men; and this having taken place when the in-

hence, if at a previous time other representations had been made, they are controlled by representations made when the policy is made, which revoke, contradict, or even qualify the former. This has been carried so far as to hold that a representation of the nationality of a ship, made when the slip was subscribed, was controlled by a statement when the policy was made, giving the name of the ship, and saying nothing of her nationality.<sup>1</sup>

If, however, a representation be made for the purpose of obtaining insurance, at a time previous to making the policy, and it has not been revoked or qualified subsequently, it will have the same effect as if repeated when the policy is made. But the assured is not only at liberty to withdraw or qualify, when the policy is made, any representation previously made, by which he does not wish to be bound, but if he has learnt new facts it is his duty to make his representation conform to them.<sup>2</sup> He can have no claim on the

insurance was talked of, and the terms of it agreed upon, it must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured." Verdict for the defendant.

<sup>1</sup> Dawson v. Atty, 7 East, 367, *supra*.

<sup>2</sup> Fitzherbet v. Mather, 1 T. R. 12. The facts in this case were: Thomas, a corn-factor residing in Devonshire, received orders to ship a cargo of oats to Portsmouth, on account of the assured. The day this order was filled he wrote to the consignee, stating the fact, and also that the ship had sailed at once, but he feared the wind would force her back. The same day he wrote to another agent of the assured, in London, directing him to effect an insurance, and adding these words: "I wish the whole were safe to hand. The weather appears stormy." These letters, though written on the 16th, did not leave the writer's residence till one P. M. on the 17th; early on the morning of which day Thomas knew of the loss of the ship. He did not, however, send any

further information to the London agent, who, having on the morning of the 26th received the letter of the 17th, and also orders from the assured to procure insurance, submitted these letters to the underwriters as his instructions, and upon them procured a policy to be effected on the oats, "lost or not lost, from Hartland to Portsmouth." It was contended, on the part of the underwriters, that this policy was void, on the ground of misrepresentation; and the court held it was so, on the principle, that though the assured was innocent, yet as he had built his information on that of his agent, and the agent had been guilty of misrepresentation, the assured himself ought to suffer for it. The nature of the misrepresentation itself is thus stated by Lord Mansfield: "This policy was effected by misrepresentation, because the underwriter was warranted, on the information of the agent, to take for granted that, on the 17th of September at one o'clock, the ship was safe; for the agent gave an account of the ship being loaded, but said nothing at all of what had happened to her."

insurers if he permits them to be deceived by a representation which was true when he made it, but which he knows to be not true when the policy is made. It may not, however, be quite easy to determine how stringent the obligation upon him is to undeceive the insurers. It has been held in this country that if the insured, having requested insurance, learns before the policy is made that the ship was lost, or anything else which might reasonably deter the insurers from making the insurance, he is certainly bound to communicate the truth, but is not bound to make an extraordinary effort for this purpose. If he can give them the necessary information in season, by mail, he is bound to do so, but he need not send an express.<sup>1</sup> How far this indulgence to the insured would be

<sup>1</sup> In *M'Lanahan v. The Universal Insurance Co.*, 1 Pet. S. C. 170, the loss occurred at no great distance from the port of Havana; and if letters had been sent ashore at that port, there was strong reason to believe that they would have been received by the insured in time to countermand his order for insurance. Mr. Justice *Story*, who delivered the opinion, remarked: "The record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated that he was in a situation to make such communication, or that he knew of vessels being about to depart for the United States from Havana. Nor is it shown what were the means and facilities of communication in the course of trade and voyages between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. We may, indeed, conjecture how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the

risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits to do so, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by English as well as by the American authorities, and particularly by *Watson v. Delafield*, 1 Johns. 152, 2 Caines, 224, 2 Johns. 526, where most of the early cases are collected and commented upon. The only matter for observation is, whether the rule as to diligence may not in certain cases be somewhat more strict, so as to require what, in *Andrew v. Marine Ins. Co.*, 9 Johns. 32, is called 'extreme diligence'; or what, in *Watson v. Delafield*, is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only possibly but probably arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of each particular case; and that the expres-

carried is not clear ; it has been held, rightly we think, however, that if he could give them the necessary information by the telegraph in anticipation of the mail, he would be bound to do so.<sup>1</sup> To return, however, to the construction as to time ; if the representation be that the vessel will not sail from a certain place before a certain day, it is construed to mean that the policy shall not attach until that day, although the vessel is insured from that place to another place, and did actually sail at an earlier day.<sup>2</sup> Until the day

sions thrown out in the cases above mentioned were not so much intended to point out a stricter rule, as to intimate that there might be cases in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which insurance is to be made, and the means of communication by mail or otherwise are regular or numerous ; or where, from lapse of time and the date for the order of insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence." In *Andrews v. The Marine Ins. Co.*, 9 Johns. 32, a vessel insured from Charleston to New York was during the voyage stranded and lost on Little Egg Harbor Beach, on Monday, the 26th of March, at 2, A. M., about ninety miles from New York. The insurance was effected by A and B, part owners, for themselves, and the other owners, of whom the master was one, on the 9th of April following ; but A and B knew nothing of the loss until after the insurance. The master was so much hurt, at the time of stranding, as not to be able to attend to business

for two or three days ; but he made immediate inquiry after the means of communicating information of the loss to New York, and found that the only conveyance by land was the mail, from a place ten miles distant from the wreck, and which went only once a week, and had previously left the place on the evening of the 26th, and would not leave it again till the Monday following. Several vessels lay near the place of the wreck, bound to New York, but were detained by head winds. With a fair wind, a vessel would arrive at New York in one day. The master having put the cargo, which had been saved, on board of three small vessels, embarked in one of them on Saturday the 31st of March, but, on account of contrary winds, did not arrive until the 11th of April. It was held, that there was no actual fraud, and that the master, not knowing of the intention to effect an insurance, was bound to use no more than ordinary diligence ; and that, under the circumstances, there was not such gross negligence or constructive fraud as would vacate the policy. See also *Green v. Merchants' Ins. Co.*, 10 Pick. 402.

<sup>1</sup> *Proudfoot v. Montefiore*, Eng. Law Rep., 2 Q. B. 511.

<sup>2</sup> *Kemble v. Bowne*, 1 Caines, 75, was an action on an open policy for \$ 7,500 on the ship *Helen*, "at and from Point Petre, Guadaloupe, to St. Thomas, beginning the adventure at and from Gua-



stated in the representation comes, the vessel is not under insurance, but we apprehend that when the day comes the insurance will attach. So, if the representation is at a certain place on a certain day, and consequently, although the policy contains lost or not lost, the insurers are not liable for any accidents preceding that day.<sup>1</sup> A similar construction has been applied to the time at

daloupe, and to continue till her arrival at St. Thomas, and there safely moored." Per *Curian*: "In a case like this, when a vessel has been long in port, previous to an insurance, the risk does not commence till some act be done towards equipping her for the voyage, or on the day in which she is stated, as here, to have been in safety in the port from which she was to sail; this was the 28th of July, 1800. If she had been lost or injured before that day, the underwriters would not have been liable." The learned reporter adds in a note: "If an insurance 'at and from' a foreign port, where a vessel then is, in the course of her voyage home, the policy attaches if she be in physical safety, though she may be in political danger. *Bell v. Bell*, 2 Campb. 475. But if she arrives a wreck, and has never been once in safety, it does not. *Parmenter v. Cousins*, Ib. 235. But there is a degree of sea-worthiness commensurate to the risk, which gives the technical safety required to render the policy effectual; for a vessel may be sea-worthy under the word 'at' while undergoing repairs, and when she would not be sea-worthy 'from' her port on the voyage. *Forbes v. Pillson*, Parde (6th ed.), 299, n., though the policy be on her 'at and from' her original port of departure. See also *Garrigues v. Coxe*, 1 Binney, 594." It was held in *Patrick v. Ludlow*, 3 Johns. Ca. 10, that the words "at and from," in a policy on goods, means from the time the goods are laden on board the vessel.

*Radcliffe, J.*, said: "A policy on goods, for any voyage, from the nature of the subject, cannot attach till they leave the shore to be laden on board."

<sup>1</sup> In *Seaman v. Fonnereau*, 2 Str. 1183, the facts were: On the 25th of August, 1740, the defendant underwrote a policy from Carolina to Holland. It appeared that the agent for the plaintiff had, on the 23d August, received a letter from Cowes, dated 21st August, wherein it was said: "The 12th of this month I was in company with the ship Davy (the one in question) at twelve at night, lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship, however, continued her voyage till the 19th of August, when she was taken by the Spaniards, and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated 27th June before. Several brokers were examined, and proved that the agent ought to have disclosed the letter, for either the defendant would not have underwrote, or would have insisted on a higher premium. And the Chief Justice was of that opinion, and declared, that as these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material that the loss was not such a one as the letter imported; for those things are to be considered in the situation of them at



which the policy would attach when this is dependent upon the loading of the goods. Thus, when the insurance was on goods on board a Swedish vessel, at and from a certain port to another port, with the usual words declaring the commencement of the risk to be "at and from the loading of the goods on board the ship," it is the settled legal construction of such a policy that the goods must be laden at the port of departure mentioned in the policy.<sup>1</sup> But

the time of the contract, and not to be judged by subsequent events; he therefore thought it a strong case for the defendant, and the jury found accordingly. *Ratcliffe v. Shoolbred*, 1 Park on Ins. (8th ed.), 413, is as follows: An action was brought on a policy of insurance on goods on board the *Matty and Betty*, at and from the coast of Africa, to her last discharging port in the West Indies. The objection made to paying the loss was, that there had been a material concealment or misrepresentation of the true state and situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of Africa, with directions to proceed from thence to the West Indies, and to stop at Barbadoes if she could get a sale, and if not to proceed to Montego Bay. On the 2d of October she sailed from St. Thomas, on the coast of Africa, with a cargo of slaves, and was taken on the 6th of December following by an American privateer. A letter was received by a house at Liverpool on the 21st of February, mentioning that the ship was well, and sailed from St. Thomas on the 2d of October. This information was communicated next day to the plaintiff, who, in consequence of it, wrote to two different brokers the same evening to get a new insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions

to the brokers, the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers they wrote thus: "We should be glad if you would get us £ 600 more on the ship, as she is rather long, and we think it is not prudent to run so large a risk at such a time. We expect to hear soon of her." It had afterwards occurred that the policy might be effected, if intimation was not given of the letter which had been received. The broker, therefore, by direction of the plaintiffs, added to the instructions, "the above ship was on the coast on the 2d of October," but said nothing of her having sailed from St. Thomas. The policy was dated the 21st of March. Lord *Mansfield* held: "The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable; *a fortiori*, if he suppress or misrepresent from fraud. The question is, whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable." The jury found for the defendant. *Kirby v. Smith*, 1 B. & Ald. 672; *Kemble v. Bowne*, 1 Caines, 75, *supra*, p. 439, n. 2.

<sup>1</sup> *Nonnen v. Reid*, 16 East, 176, insurance was effected at and from all and every port, &c., on the coast of

in this case the goods had been laden at a previous port, and a representation of this fact was made to the insurers, and it was

Brazil to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the ship, at all or every port, &c., on the coast of Brazil, and from the 17th of September, 1800. The ship sailed from the Cape of Good Hope with a cargo, and arrived at Rio Janeiro before the 17th of September, and continued on the coast of Brazil until November of the same year, when she was seized and carried back to the Cape with the original cargo on board. It was held that the policy never attached, a cargo laden at the Cape of Good Hope not being a cargo laden on board on the coast of Brazil, within the meaning of the words of the policy. *Robertson v. French*, 4 East, 130. See, to the same effect, *Graves v. The Marine Ins. Co.*, 3 Caines, 339, and *Richards v. The Same*, 3 Johns. 307. In the case of *Spitta v. Woodman*, 2 Taunton, 416, and 16 East, 188, in note, the insurance was upon goods, at from Gottenburg to her port of discharge in the Baltic, beginning the adventure on said goods from the loading thereof on board the ship, without saying where. On the voyage insured the ship was captured. It appeared that her cargo had been carried from London to Gottenburg, no part of which was landed at the latter place. The defendant had insured the cargo from London to Gottenburg on a previous policy, and was fully aware that the subsequent policy was on the same cargo. It was held that the latter policy never attached, no loading having taken place at Gottenburg. In *Vredenburg v. Gracie*, 4 Johns. 444, in note, the insurance was upon goods at and from any port or ports in the West Indies, begin-

ning the adventure on the said goods from the loading thereof on board in the West Indies. Goods had been shipped on board in New York and carried to the West Indies before any insurance on them had been made. It was proved by parol evidence that, at the time of subscribing the policy, the defendant was informed that the same property which the vessel carried out was to be insured.

The vessel sailed from Cape Nicholas-Mole in St. Domingo for St. Marda, and was captured, her cargo not having been unloaded since leaving New York. It was held by *Lansing, Ch. J.*, and *Lewis, J.* (*Benson, J.*, dissenting), that the plaintiff was entitled to recover. But see the remarks of *Livingston, J.*, upon this case, in delivering the opinion of the court in *Graves v. The Marine Ins. Co.*, 4 Caines, 342. With reference to the expression "from the loading, &c., on board the ship," Lord *Ellenborough* observes: "It is no longer to be doubted what construction is to be put upon those words. It is to be considered also, in aid of such construction, that the goods may have been damaged in their transit to the place at which the policy was to attach, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk." In *Hooneyer v. Lushington*, 15 East, 46. In *Nonnen v. Kettlewell*, 16 East, 476, the insurance was on goods at and from Landsrona to Wolgast, the risk to commence at and from the loading thereof on board the ship. The ship was originally loaded at Gottenburg. After her arrival at Landsrona, a part of the cargo was taken out of the ship's hold, landed on the quay, and replaced

held to have controlled the otherwise legal construction of the policy.<sup>1</sup> Mr. Duer says, when speaking of this case,<sup>2</sup> “that the assent of the underwriters to insure upon a representation increasing his risks is just as truly an agreement to assume the new risks which the representation discloses as if they were expressly named in the policy.” He must, however, be understood to mean only that increase of risk which is caused by the effect of the representation upon the construction of the policy. It is obvious and certain that a representation specifically adding other risks to those mentioned in the policy could not be received to vary the policy. We have seen in a previous chapter that a paper may be so attached to the policy, and identified by reference to it, as to make it a part of the policy, and a material statement therein becomes a warranty. But if the paper be pinned or wafered to the policy, but not so connected with it as to be a part of it, it is then not a warranty, but a representation.<sup>3</sup> And there are cases in which it

in the ship. A sufficient quantity was thus taken out to enable the custom-house officers at Landsrona to inspect and examine the whole cargo on board, the duties on which were paid. These circumstances were held to distinguish the case from *Spitta v. Woodman*. The period of time from which the responsibility of the underwriters was to commence was as well fixed by such partial unloading and reloading, as by a more perfect and entire shipment; and as the policy was free of average, a more perfect examination, for the purpose of ascertaining whether any damage had been sustained by the goods, before the ship's arrival, was immaterial. In the case of *Murray v. The Columbian Ins. Co.*, 11 Johns. 302, the insurance was upon goods at and from Cagliari to St. Petersburg, beginning the adventure upon the said goods from and immediately following the loading thereof on board at Cagliari. The vessel arrived at Cagliari with a cargo nearly all of which was hoisted out upon deck, in order to take in five hundred salms

of salt, and the whole was shifted, examined, and restored in perfect order. The whole cargo was specified in the invoice and bill of lading as shipped at Cagliari. The vessel sailed thence, and was captured. It was held, that the hoisting of the cargo out of the hold of the ship and restowing it at Cagliari did not amount to loading it on board at that place, either according to the words or spirit of the contract, and therefore, except as to the salt, the plaintiff was not entitled to recover. *Bell v. Hobson*, 16 East, 240, and note to same (Am. ed. vol. 8, p. 419).

<sup>1</sup> *Nonnen v. Reid*, 16 East, 176, *supra*, p. 441, n. 1.

<sup>2</sup> 2 Duer on Ins. 726.

<sup>3</sup> *Bean v. Stupart*, Dougl. 12, n. 4. “At the sittings at Guildhall after Michaelmas, 19 Geo. 3, in a cause of *Kenyon v. Berthon*, the following words were written transversely on the margin of the policy: ‘In port, 29th of July, 1776.’ The ship was proved to have sailed the 18th of July, and Lord Mansfield held, that this was clearly a

would seem that statements in the policy are construed only as representations.<sup>1</sup>

It should be added that the statement of an opinion as to the construction of the terms of a policy will not defeat it, although the opinion was erroneous.<sup>2</sup> Where the statements use such words as "expected," such construction is obvious;<sup>3</sup> but a similar

warranty; and though the difference of two days might not make any material difference in the risk, yet as the condition had not been complied with, the underwriter was not liable. But though a written paper be wrapped up in the policy, when it is brought to the underwriters to subscribe, and shown to them at the time, or even though it be wafered to the policy at the time of subscribing, still it is not, in either case, a warranty, or to be considered as part of the policy itself, but only a representation. The first of those points occurred in a cause of *Pawson v. Barnevelt*, tried before Lord *Mansfield* at Guildhall at the sittings in Trinity Term, 18 Geo. 3, where the policy was the same as the case of *Pawson v. Ewer*, Cowp. 785 (p. 429, n. 1, *supra*). The counsel for the defendant offered to produce witnesses to prove that a written memorandum enclosed was always considered a part of the policy. But his lordship said, it was mere question of law, and would not hear the evidence; but decided that a written paper did not become a strict warranty by being folded up in the policy. The second occurred in *Bize v. Fletcher*, tried at Guildhall after Easter, 19 Geo. 3, where it appeared that, at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioned several particulars of her intended voyage, which particulars in the event had

not been complied with. Lord *Mansfield* ruled, that this was only a representation; and if the jury should think there was no fraud intended, and that the variance between the intended voyage as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, he directed them to find for the plaintiff, who accordingly had a verdict."

<sup>1</sup> See p. 417, n. 2, *supra*, and cases there cited.

<sup>2</sup> In *Dennison v. Mutual Ins. Co.*, 20 Me. 125, *Whitman*, C. J., observes: "Opinions, if honestly entertained and honestly communicated, are not misrepresentations, however erroneous they may be." *Astor v. Union Ins. Co.*, 7 Cowan, 202.

<sup>3</sup> *Rice v. New England Mar. Ins. Co.*, 4 Pick. 439. In this case, Baxter, the captain of the vessel insured, wrote to his agent, Currie, and stated that he should sail on the 12th of the March. Currie, in a letter applying for insurance, said that the captain "expected to sail on the 20th." The court say: "We think that the statement of the day on which a vessel will sail is nothing more than stating an expectation that she will sail on that day. The positive intention to sail on a future day amounts only to a strong expectation, for it must depend on the elements and other causes affecting the sailing of vessels whether such intention shall be executed or not." In *Baxter v. New*

construction has been held in other cases. Thus a provision to return a part of the premium "for convoy" was held to be a representation of the probability of convoy; and as the insured knew that she had sailed without convoy, the representation was false and fraudulent, and avoided the policy, although it was not a warranty.<sup>1</sup> So where the policy gives the name of the master, adding "or whoever else shall go as master in the said ship," this is certainly no warranty that the person named will go; and although it had been said to be a representation that he will go as master unless another is substituted as sufficient cause,<sup>2</sup> we should have much doubt of this. The parties may not only declare in the policy that an affirmative statement should be construed as a representation, but it would seem to be law in England that they may do this effectually by a subsequent and separate agreement.<sup>3</sup>

Perhaps the most important influence of construction on a rep-

England Ins. Co., 3 Mason, 96, the same statement was considered by *Story, J.*, as a representation.

<sup>1</sup> *Reid v. Harvey*, 4 Dow, P. C. 97, p. 417, n. 3, *supra*, and cases there cited.

<sup>2</sup> 1 Marshall on Ins. 315; 1 Emerigon, 182.

<sup>3</sup> In *Lothian v. Henderson*, 3 Bos. & P. 499, the policy of insurance was on goods on board the *Catherine*, an American vessel. After the policy was effected, doubts having arisen whether the policy contained a warranty, the underwriters signed an agreement that, in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being American bottom, and by bills of lading show that the cargo was shipped on account and risk of A. B., upon which they would settle by granting bills at four months for the amount of their subscriptions, in full dependence that the insured would use their best endeavors to recover the property as for account of the shippers. Held, that on proof being produced that the ship was American bottom, and the cargo shown by bills of lading to have been shipped on account and risk

of A. B., the assured were entitled to recover on a loss by capture, notwithstanding the production by the underwriters of any French sentence of condemnation to falsify the warranty. Lord *Eldon* held: "In the present case, giving effect to the explanatory agreement, and considering it as part of the contract, it seems to me impossible to contend that the underwriters undertook to receive proofs of the property being American only in case it was not condemned as hostile by a French court, or that the assured undertook that no such event should happen. The intention of the parties seems to have been to explain themselves in this way, viz. that if there was a warranty of American property in the policy, yet that it should not be so construed as to preclude the assured, in case of a loss, from proving the ship and property to be American, even though a French sentence should condemn them as not being American. If this be not the legal effect of the agreement, I have not as yet been able to learn what effect the agreement is to have."

resentation occurs when it determines whether it be a representation of the fact or only of the belief, and when it distinguishes between a representation as of the present and a promissory representation. Perhaps any statement which looks to the future must be regarded as an expectation only; and so the Supreme Court of Massachusetts have said in reference to the statement of a day on which a vessel will sail.<sup>1</sup> But if the statement is one which it is perfectly in the power of the insured to make good, we have seen that he is bound to do so. And if, more than this, the words express or fairly imply a positive promise, he must be under a still stronger obligation to do what he promises. If he states an expectation over which he has obviously no power whatever, it must be understood of course that it is merely an expectation, and the only question is whether this want of power is obvious. But if we suppose him to make a positive promise about such a matter, would not the general rule apply, that he could not avail himself of his inability to perform it, unless the inability was not already certain, but so obvious that the promisee must have known it and understood his words accordingly? We think a similar question arises when the insured represents certain intentions on his part. If his purpose is to deceive, the fraud of course defeats the policy; but if he was honest in his statement, we should say that he was at liberty to change his intentions. Because it was always in the power of the insurers, if they intended to rely upon his statement as a promise, to ask of him an effectual and unambiguous promise. Perhaps the burden of proof will rest on him to show why he had changed his intentions; but we think this would be satisfied by proof that he had done so *honestly*, although he had not done so *reasonably*.

The whole subject of promissory representations is involved in some obscurity. We have indeed a strong assertion in high authority, that a representation of a future fact or event is never to be construed as *promissory*,<sup>2</sup> that is to say, the failure of the fact

<sup>1</sup> *Rice v. New England Mar. Ins. Co.*, 4 Pick. 439, *supra*, p. 444, n. 3.

<sup>2</sup> In *Alston v. The Mechanics' Mut. Ins. Co.*, 4 Hill, 334, Chancellor *Walworth* discusses the question in a most elaborate manner, and from the opinion we extract: "Marshall who, I admit is

a writer of very considerable authority, does indeed speak of two different kinds of representations, one of which he calls affirmatory and the other promissory. But I have not been able to find any case in which a court has adopted this distinction. And the only



or event will never defeat the policy, unless on the ground that the representation itself was fraudulent; the main reason being

other writer on the law of insurance who appears to have considered a representation as a contract between the parties in Ellis. He says: 'A representation in insurance is in the nature of a collateral contract.' Ellis, *Law of Life and Fire Ins.* 29. I have examined Millar, Weskett, Annesley, Hughes, Evans, Park, Beaumont, Phillips, Emerigon, Blaney, Quenault, Grun & Joliat, Vincens, La Fond, Persil, Merlin, Pardessus, Boulay Paty, and the works of some other English and foreign writers on the subject of marine, fire, and life insurances, and, so far as they say anything on the subject, I find them to concur in saying that misrepresentation, in reference to insurance contracts, is a false affirmation as to some *fact* material to the risk; which affirmation is made by the assured, or his agent, either from a mistake as to the fact represented, or with a design to deceive the insurer. Ann. on Ins. 124; Blaney on Life Ins. 59; Evans's *Law of Ins.* 58-64; Hughes's *Law of Ins.* 245; 1 Phillips on Ins. 90; 1 Park on Ins. 304; Quenault, *Des Assur. Terrestres*, 289; Persil, *Traite Des Assur. Terr.* 297; Grun & Joliat, *Des Assur. Terr.* 260; 2 Boulay Paty, *Cours de Droit Com. Mar.* 87. See also 3 Kent, Com. 283. It is hardly possible to suppose that, if there was such a term known to the law of insurance as a promissory representation, rendering the contract void for the non-performance of a stipulation in the nature of a collateral executory agreement, which the parties did not think proper to make a part of the written contract, it would have been passed over in silence by all the writers I have referred to." The learned judge also

cites the following cases in support of his proposition. *Bize v. Fletcher*, 1 Park on Ins. 141; *Macdowall v. Fraser*, 1 Doug. 260; *Curell v. The Miss. Mar. & Fire Ins. Co.*, 9 Louisiana, 163; *Baxter v. New England Ins. Co.*, 3 Mass. 96; *Rice v. New England Mar. Ins. Co.*, 4 Pick. 439; *Bryant v. The Ocean Ins. Co.*, 22 Pick. 200; *Allegre v. The Maryland Ins. Co.*, 2 Gill & Johns. 136. He continues as follows: "These cases therefore show that a statement as to a future fact or event which is in its very nature contingent, and which the insurer knows the party could not have intended to state as a known fact, but as an intention or expectation merely, if honestly made, and not with an intent to deceive, is not a collateral contract or a promissory representation which the assured is bound to see performed to render his contract valid. But if the underwriter considers the statement material to the risk, and is unwilling to insure at the contemplated premium without binding the assured to the performance of it as a condition precedent to his liability, he should make it a part of the contract stated in the policy. Where the assured acts in good faith, without any intent to deceive, and without concealing or misstating any fact within his knowledge which is essential to the underwriters to know, to enable them to judge of the propriety of assuming the risk and the amount of premium and other conditions of the policy, common justice requires that the party who pays the premium should be informed by the terms of the written agreement what is the real contract between him and the underwriters, and it should not be left to the uncertain



that, if a representation refers to the future, and the insurers intend to rely upon it, they should make it a part of their bargain by inserting it in the policy. In a case in the Supreme Court of Massachusetts,<sup>1</sup> the language used in the decision seems to go too far. It is said: "A representation or other parol evidence is admissible to explain a latent ambiguity or to prove a usage which may affect a policy." And the whole argument supposes that it is inadmissible otherwise. We think, however, that some distinction between a policy of insurance and other written contracts on this point is now too well established to be shaken; although much ingenuity has been sometimes exercised in bringing the admission of representations within the common rule.

There are numerous cases, both in England and this country, where a representation looking to the future, as that the ship will sail on a future day, defeats the policy if the thing thus promised does not occur, although no fraud whatever is imputable to the insured.<sup>2</sup> In other words, definite statements concerning future facts made by the insured by way of representation are binding upon him.<sup>3</sup>

recollection of any one to prove a different agreement from that, which is contained in the written policy. For it frequently happens that where negotiations are carried on between parties, and they suppose they understand each other as to the terms of the bargain, they find, when they come to reduce their agreement to writing, that they do not understand it alike. It is for this reason that parol proof is not admissible to vary or alter the terms or the legal meaning of a written contract, by showing what either party said while the negotiation was going on. Fraud, misrepresentation, and deceit are necessary exceptions to this general rule; but there is no good reason why anything which is in fact a part of the contract between the parties should form an exception to the rule in an insurance case."

<sup>1</sup> *Bryant v. The Ocean Ins. Co.*, 22 Pick. 200.

<sup>2</sup> *Dennistoun v. Lillie*, 3 Bligh, P. C. 202, p. 429, n. 2, *supra*; *Edwards v. Footner*, 1 Campb. 530, p. 436, n. 1, *supra*.

<sup>3</sup> *Steel v. Lacy*, 3 Taunt. 285. In this case the ship on which insurance was effected was represented as American. She was captured and condemned on account of a want of neutral papers, to which she was entitled. It was held, that this want of papers defeated the policy, as the representation of nationality was binding. Lord Mansfield, C. J., said: "It is stated on the face of the sentence, that the want of a sea-passport was a ground of condemnation, and that the court had no convenient (meaning no sufficient) reason to depart from this severity, the circumstances in *concreto* being all against the captain. For the reason I have mentioned, it is manifest that the Berlin decree could not subsist in Denmark, and that being so, the ship is in the common state of an American ship, which, therefore, ought

A warranty may be of the present or of the future. But Lord Mansfield's very strong and inaccurate remark,<sup>1</sup> that if the insured states that as a fact which he does not know to be true, but only believes, it is *the same as a warranty*, must be understood as applying only to the present, and as connected with his statement a few lines previous, that "the assured should represent the true state of the ship to the best of his knowledge." It must be remembered that Lord Mansfield used these words in a charge to a jury, and not in giving an opinion of the court. It is, however, remarkable that he should have used such an expression even thus, when we remember what he says elsewhere,<sup>2</sup> as that "there cannot be a clearer distinction than that which exists between a warranty which makes part of the policy and a collateral representation." And again :<sup>3</sup> "There is an essential difference between a warranty and a representation. The warranty is a part of the contract. *There can be no warranty by any collateral representation.*"

If by the term "same as a warranty," it is meant only that it may as effectually defeat the policy, this must be confined to positive assertions of fact, and can have no application to statements of honest but erroneous belief. We should admit that if the insured sees fit to state anything material as a positive fact, he takes upon himself the risk of its being true, and therefore his honesty does not protect him if it be untrue.<sup>4</sup> But this is not on the ground that he was in fault in stating as true what he did not know to be true, for it would have the same effect if he had made all possible efforts to ascertain the truth, and had been deceived. But here comes the distinction to which we have already referred. If he had made the statement only as a matter of belief, and stated this honestly, it would have been sufficient, however inadequate were the grounds of his belief. In our notes we give instances where the court construed the words into mere belief, although in some of them the representations were very definite as of facts.<sup>5</sup> This is shown by

to be documented as a neutral ship. It hall, after H. 1782, cited Park on Ins. is quite ridiculous to talk of this ship (8th edit.) 414.

being an American, if she be not documented as an American ship." <sup>2</sup> Pawson v. Watson, Cowp. 785, p. 429, n. 1, *supra*.

See also Feise v. Parkinson, 4 Taunt. 639; Von Tungeln v. Dubois, 1 Campb. 151. <sup>3</sup> Simond v. Boydell, Dougl. 271, *supra*.

<sup>4</sup> See p. 404, n. 1, *supra*.

<sup>5</sup> In Bryant v. Ocean Ins. Co., 22

<sup>1</sup> Fillis v. Brutton, sittings at Guild-

some of the cases to which we refer. In others, however, similar representations seem to defeat the policy, because false in point

Pick. 200, the assured represented that the vessel was taking in paving-stones for ballast, and would fill up with hay. Instead of complying with this representation, the vessel took in an entire cargo of paving-stones and no hay. This was a more perilous cargo, and the risk was thereby increased. There was no evidence that, at the time the representation was made, the insured were not taking in stones as represented, or that they did not then expect or intend to take in a cargo of hay, and no fraudulent intent was shown. Held, that this being merely a statement of the intention of the assured, made without fraud, the policy was not rendered invalid by that non-compliance with it. In *Hubbard v. Glover*, 3 Campb. 313, a material fact coming under consideration between the insurers and the agent of the insured, who was endeavoring to effect insurance, the insurers requested an express warranty. But this the agent declined making, on the ground that it was unnecessary, because of certain facts, which he stated, and which covered all that would have been embraced in the proposed warranty. But the facts so stated were not true. Nevertheless, the insurers were held, on the ground that the statement was honest, and that the facts were such as could not be certainly known, and must have been stated only as matter of belief. We give this case more fully, *post*, note 3, p. 452. See also *Christie v. Secretan*, 8 T. R. 192. So as to where a vessel is represented as expected to sail at or within a certain time, and does not sail till afterwards. *Bowden v. Vaughan*, 10 East, 415. This was an action upon a policy

of insurance on goods at and from Lisbon to London. Previous to the effecting of the insurance, a letter had been received by the plaintiff from his correspondent, dated Lisbon, October 27, in which the writer advised him that he had consigned to him eighteen hundred and twenty-eight hides, by the *Almirante Nelson*, which were to be insured, stating that she was a Portuguese ship, and would sail in a few days. This letter was not shown to the underwriters at the time of subscribing the policy, but the broker represented that the ship was to sail in a few days; and he said, upon his examination at the trial in Guildhall, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected. There was no doubt, therefore, of the materiality of the representation; and in fact the vessel did not sail before the 29th of November, and was stopped by the enemy on the 30th. Lord *Ellenborough*, C. J., left the case to the jury, advising them to consider that the person by whom the representation was made was the owner of the goods, who could only speak of the sailing of the vessel from probable expectation; and that if such representations were made *bona fide*, it should not conclude him. And the jury, being of opinion that the representation had been made *bona fide* on probable expectation, found for the plaintiff. A motion was made for a new trial, but "the court were of the same opinion as the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must, from the nature of the thing, be considered only as a

of fact, however innocently made.<sup>1</sup> Taking all the cases together, it might be inferred from them, that, wherever the representation

probable expectation, he having no control over the event." See also *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill, 329; *Carrell v. The Miss. M. & F. Ins. Co.*, 9 La. 163; *Dennistoun v. Lillie*, 3 Bligh, 202; *Bize v. Fletcher*, 1 Dougl. 284. In *Barbour v. Fletcher*, 1 Dougl. 305, it appeared on the trial, that, when the underwriter signed the policy, the broker spoke of the vessel as "expected to leave the coast of Africa in November or December." In truth the vessel had left the coast in May. Lord *Mansfield* held: "The representation is not material. It was only an expectation, and the underwriters did not inquire into the grounds of the expectation." In *Whitney v. Haven*, 13 Mass. 171, it was held that where the assured, at the time of effecting the policy, said that the vessel was to sail in five days, and the underwriter said he would not be bound if she did not sail, and in fact she did not sail for more than a month after, and in the mean time the rate of premium had considerably increased, such declaration, not being a part of the written contract, did not affect the insurance. *Rice v. New England Mar. Ins. Co.*, 4 Pick. 439. It was held in *Allegre v. The Maryland Ins. Co.*, 2 Gill & J. 136, that an application for insurance from Rio de la Plata to Havana, which stated "said vessel will sail from La Plata in the course of this month," made by a merchant to an insurance company, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief or opinion of the applicant that she would sail at the time mentioned. So, if the broker states, by way of inference or computa-

tion, that the ship was at a given place when the policy was made, the underwriters are held, though the broker was mistaken, it being their duty to inquire what the facts were on which he founded his opinion. *Brine v. Featherstone*, 4 Taunt. 869. See also *Clason v. Smith*, 3 Wash. C. C. 156; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. 64.

<sup>1</sup> In *Currell v. Miss. Mar. & Fire Ins. Co.*, 9 La. 163, it appeared that one of the plaintiffs who applied for insurance stated to the secretary of the company that the ship had been at sea about seventy-two days; that she sailed between the 18th and 25th, but not before the 18th. Another of the plaintiffs distinctly stated that he had letters from Belfast to the 18th of October, at which period the ship *Edward Downs* had not sailed. These were the representations made by the party effecting the insurance and at the time of taking out the insurance. The evidence established that the vessel actually sailed the 6th of October, and at the time of effecting the insurance was out ninety instead of seventy-two days, as represented. Mr. Justice *Mathews* delivered the opinion of the court, from which we extract: "The only question is, whether the information or representation given by the insured to the insurers at the time of making the contract, and which is shown by the evidence to have been incorrect, was of a fact material to the risk assumed. We state this as the only question, because, considering the obligation of the insurers complete and binding from the time the terms of insurance were accepted by them, if the contract be one entered into in good

looks to the future, and there are not words of positive promise, the presumption will be that he declares only a belief or expectation, and therefore is bound only to honesty in his statements; and even if the language purports to be that of absolute affirmation, where, from the very nature of the statement, the insurers must have understood it as a mere matter of opinion, it would have only that effect.<sup>1</sup> If the insurers ask of the insured, or his agent, a warranty, and this is refused, the statement may or may not be regarded as a representation; as where a broker said that a vessel was American, but added that he was directed not to warrant anything, it was held that there was not even a representation of nationality.<sup>2</sup> Somewhat similar ruling has been held where a warranty was refused, and a representation made, because the ship had sailed, and must be at a certain place where a cargo was ready for her. This was regarded as a representation, but only of expectation or belief.<sup>3</sup>

faith and without error, in considering the case, we leave entirely out of view the subsequent occurrences disclosed by the testimony, as to the observations of the president of the company about the time the policy was delivered to the plaintiffs, and after some additional facts relative to the progress of the ship on her voyage had come to the knowledge of the insurers. These facts can have no influence on the cause, for it was not shown, at the time of making the contract, that the vessel had been seen near the coast of the island of Jamaica. From the testimony it is seen that the ship, in the present instance, was greatly out of time when the insurance was effected. The knowledge, therefore, of the true date at which she left the port *a quo*, as it appears to us, was all-important to those who were about to take on themselves the risk of her safe arrival in the port of destination; and they cannot be presumed to have been conscious of this fact, as they were not directly interested in such knowledge previous to the time when the erroneous representa-

tion was made to them by the plaintiffs." *Dennistoun v. Lillie*, 3 Bligh, 202; *MacDowall v. Fraser*, Dougl. 260.

<sup>1</sup> See p. 449, n. 5, *supra*, and cases there cited.

<sup>2</sup> *Christie v. Secretan*, 8 T. R. 192.

<sup>3</sup> *Hubbard v. Glover*, 3 Campb. 313. This was an action on a policy of insurance on the ship *Alexander*, at and from Petersburg or Cronstadt to London, at a premium of twenty guineas per cent. The policy was subscribed by the defendant on the 13th of June. Before subscribing it, he wished a warranty to be introduced that the ship should sail before the 1st of August, but the broker said: "There is no occasion for that; the ship has sailed some time, and must now be at Gottenburgh. There is a cargo ready for her, and she is sure to be an early ship." In point of fact she had reached Gottenburgh some days before this conversation, and she performed her voyage to Cronstadt without any accident or delay. On the 30th of the same month the ship sailed on the homeward voyage, and, after lying some time for convoy at Matwick,

If the insured makes a representation only on information received, if he submits his information with all its grounds to the judgment of the insurers, it would seem that if there was any mistake it was the mistake of both parties, and should not defeat the policy.<sup>1</sup> If, however, he makes his statement as from information, without stating his means of information, we should say that he was bound to prove that the information was of such a kind as to lead to the inference that he might have trusted to it. But if the representation relates to an existing or a past fact, and is a positive affirmation thereof and is false, there is no case which shows that the insurers are held merely because the insured was

was wrecked on the 11th of November, off the coast of Denmark. Before she sailed from Cronstadt the winter risk had begun, and the current premium had risen to thirty guineas. Lord *Ellenborough* held: "Had the desired warranty been introduced into the policy, that would have been falsified, and the underwriters would have been discharged. But I find no representation here upon the falsity of which they can defend themselves. The broker said the ship had sailed some time, and must then have reached Gottenburgh; that a cargo was provided for her, and that she must be an early ship. Of these circumstances only the first could have been considered as within his own knowledge, and that was true. The next was likewise true, although only matter of probable conjecture, for the ship had reached Gottenburgh some days before. He said in unqualified terms, that a cargo was ready; but this, from its very nature, was only the subject of expectation and belief. Neither he nor his principal could be supposed to have been at Cronstadt or Petersburg, to see the cargo in a warehouse or on the wharf there, and I believe it is by no means a usual thing to have a cargo of Russia produce prepared for any particular ship before she sails on the out-

ward voyage. All the broker could be understood to mean was, that a cargo had been ordered for the ship in question, and that there was every reason to suppose that it would be ready for her by the time of her arrival, so that she might be expected to be an early ship. We have no evidence that this representation does not perfectly accord with the truth. The defendant, instead of insisting upon the warranty, chose to speculate upon probabilities. He erred in his calculation; but that is no reason why he should not pay the loss." Verdict for the plaintiff.

<sup>1</sup> In *Tidmarsh v. Washington Mar. & Fire Ins. Co.*, 4 Mason, 439, Mr. Justice *Story* said: "Upon the point of misrepresentation, there is one other consideration which requires our attention. Where a letter contains a representation of facts not known to the party, but from the information of others, and the letter so states the facts, or it is a necessary inference from the nature of them, there the representation is not falsified by the mere proof that the facts are not so, if the party communicating the facts did receive such information, and *bona fide* confided in it. He undertakes there, not for the truth of the facts, but for the truth of his information."



misled by his information; even if the insurers might have known, from the nature of the fact and the circumstances of the case, that it was not possible for the insured to have personal knowledge of the fact stated. But when a representation is made upon information, if this information comes from strangers, it is a general rule that the insured is not responsible for its truth, unless he chooses to make himself so by a positive assertion of the fact.<sup>1</sup>

There seems to be a difference, however, when the information is received and given to the insurers as received from an agent of the insured; for this seems to be held as a positive representation by the insured himself. Thus, if he hands to the insurers a letter from his agent, by doing so he adopts the statements in the letter.<sup>2</sup> There is, no doubt, some difficulty attending this question. If an agent be employed to procure or effect the insurance, any misrepresentations by him are as effectual to defeat the policy as if made by the insured personally.<sup>3</sup> But it is not quite so certain how far the contract is affected by the fraud or negligence of an agent whose duty it is to give full and accurate intelligence, and who misleads the owner into a representation of belief which he would not have made had he been properly instructed. In the time of Lord Mansfield a fraud of an agent of this kind, being a suppression of the fact of the loss of the ship, was held to defeat the policy.<sup>4</sup> We should say that the giving of full and ac-

<sup>1</sup> McDowell v. Fraser, Dougl. 260.

<sup>2</sup> Dennistoun v. Lillie, 3 Bligh, 202, *supra*.

<sup>3</sup> Barber v. Fletcher, Dougl. 806. In the note to this case is the following: "In the case of Shirley v. Wilkinson, which came on in Q. B. M., 22 Geo. 3, upon a motion for a new trial, Lord Mansfield and the rest of the court were clearly of opinion, that, if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear material to the jury, they ought to find for the underwriter, the contract in such case being void, although the concealment should have

been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account."

<sup>4</sup> Fitzherbet v. Mather, 1 T. R. 12, p. 437, n. 2, *supra*. The case of Stewart v. Dunlop, 4 Brown, P. C. (Tomlinson's ed.) 483, was briefly thus, as stated by Mr. Parke: "A man having arrived at Greenock, knowing of the loss of the ship insured, and meeting a friend and intimate acquaintance of the insured, and a partner with him in some other adventures, communicated the intelligence of the loss of the ship to him, who desired it might be concealed. The same day, as appears by the evidence, the person who had received this information held a conversation



curate intelligence was especially the duty of the master. This seems to be implied in an important English case, where Lord Ellenborough says: "What is known to the agent is impliedly known to the principal."<sup>1</sup> In an American case in which the

with the plaintiff's clerk, who deposed that neither at that time, nor at any other time of the said day, had he any conversation whatever with the said Mr. Boog, or message from him, either in writing or otherwise, relative to the Peggy, the ship insured, nor did he get any hint from him or any other person relative to making insurance upon her, further than the said Mr. Boog's asking the deponent if he knew whether there was any insurance made upon her, and if there was any account of her. After this conversation, the plaintiff desired the clerk to write to get an insurance effected, which he did, without stating a word, at least it did not appear that he stated any of this conversation to his master. Upon the whole of the evidence in this cause, although it did not appear by any deposition that the plaintiff knew of the loss of the ship at the time he made the insurance, the Lords of Session decreed: "That the insurance made by the plaintiff would not have been made if the brigantine Henrietta had not arrived in the roads off Greenock the day before, and brought intelligence that the ship Peggy was taken, and therefore that the policy was void." The House of Lords confirmed the decree. Mr. Park (Ins. 447) uses the following language in relation to this case: "In the decisions of the House of Lords, the reasons of the judgments never appear, and even when the learned judges give their opinions upon any cause then depending in that house, authentic reports of them are not easily obtained; the consequence of this is, that one is frequently left to con-

jecture upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the case of *Stewart v. Dunlop*, it should seem, that as no direct or positive act of knowledge was brought home to the plaintiff himself, the conversation which the clerk had with Mr. Boog was held to be a sufficient proof that the loss was known to him at the time he wrote the letter, at the desire of the plaintiff, ordering the insurance. If known to the clerk, the act of the agent, in such a case, becomes the act of the principal, because the law, upon general reasons of policy, will presume that the principal must know whatever has come to the knowledge of the agent." *Fitzherbet v. Mather*, *supra*, settles the point expressly, for, as will appear from an examination of the case, the insured was not guilty of any improper conduct in the transaction.

<sup>1</sup> In *Gladstone v. King*, 1 M. & S. 35, the facts were: "The plaintiffs, on the 25th of October, 1811, effected an insurance on a ship at and from her port of loading to her port of discharge; and it appeared that, on the 25th of July previous, the ship, whilst in her port of loading, was driven on a rock by a storm, but got off without appearing to have suffered material damage, and the captain afterwards wrote a letter to the plaintiff, without communicating the accident, which letter reached them on the 5th of October, and the ship afterwards arrived at her port of discharge, where the captain made a protest, detailing the accident, and stating that the planks of her bottom must have been chafed,

master had not only withheld the information of a total loss of the ship from his owner, but used means to prevent his receiving the information otherwise, for the purpose of enabling him to procure insurance, Judge Story held that the policy thus obtained was valid.<sup>1</sup> He rested this decision on the ground that the master

and her bottom otherwise injured by striking on the rocks. Held, that the plaintiffs could not recover, as for an average loss arising from the accident; for the captain was bound to communicate the accident, and, for want of such communication, the antecedent damage was an implied exception out of the policy; and, the policy not being made void, the plaintiff could not recover back the premium. Lord *Ellenborough* said: "With respect to the question, whether the captain was bound to transmit to his owners intelligence of the accident which happened to the ship on the 25th of July, I think that if it were but a dubious cause of damage he ought to have communicated it; but, looking at the circumstances as disclosed afterwards by the captain's protest, must we not say that they amount to something more than a dubious cause, and that there is pregnant evidence that the captain suspected the ship must have sustained some damage, though he might not know what the particular damage was? If, then, the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in such cases instruct their captain to remain silent, by which means the underwriter, at the time of subscribing the policy, would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew and might have actually communicated to the plaintiffs the cause

of damage, so as to have apprised them of it before the time of effecting the policy, I think no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy."

<sup>1</sup> *Ruggles v. General Int. Ins. Co.*, 4 Mason, 74. The insurance was effected, February 9, on the sloop *Harriet*, "lost or not lost," beginning on the 12th of January preceding. On the 19th of January the vessel was totally lost, and the master had neglected to give notice of the loss to the owner, for the avowed purpose of enabling him to procure insurance. It was held that the insurers were liable. Mr. Justice *Story*, in his remarks to the jury, considered at some length many cases (which have all been cited heretofore), and continued: "No other authorities have been produced. The point now before the court is therefore untouched by any adjudication. We must, then, consider it on general reasoning. The principle contended for is new. If well founded, it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge, or fraudulent concealment, for that is excluded by the argument. It must, then, be upon the ground that the act of the master binds the owner; and that an omission of duty to the owner, by which third persons are prejudiced, destroys the right of his owner, however

after the loss ceased to be the agent of the owners. The case being appealed to the Supreme Court, this decision was affirmed, together with Judge Story's reasons for it.<sup>1</sup> Mr. Justice Thompson,

innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guarantee the fidelity of the master to all the world, or to the insured in particular. On the contrary, the insured sometimes insures against the misconduct of the master. In England it is generally so as to barratry, and in some cases as to negligence. For what reason should the law interfere between two innocent persons to change a loss which, by contract, one has engaged to bear? It is said that he who reposes the confidence in such a one should bear the loss. But underwriters, equally with owners, repose confidence in the master. The master is the agent for all concerned. In case of loss, he acts for all concerned. In the case of an abandonment, he is, retroactively, the agent of the underwriter, from the time of the loss on which the abandonment is founded. What reason is there, why owners, acting innocently, may not insure against *bona fide* losses, of which the master withholds the knowledge? It is said, it may encourage fraud. But this argument supposes too much. Most losses in this age must be public. The first port of arrival brings all out. The crew and officers and other persons are not bound to silence. In fact, but few cases of this defence have yet occurred. But suppose it to be so. If there may be frauds, may there not be also ruinous losses to innocent owners? Is it a good public policy to endanger the interests of commerce by new implied warranties? The underwriter can require a warranty, or except the master's acts, or require his negligence to be fatal. This

very case shows how difficult it is to conceal the facts, even in an obscure place. They were universally known in twenty days, and reported in a loose rumor in twenty days. This court is called upon to lay down a new principle of law, to extend the present boundaries. But I see no analogies to lead me further, and no public policy indispensably requiring a stricter rule. If a fraudulent omission avoids the insurance, so would negligence. My opinion is, that in the present case, where there has been an abandonment in due time for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith in procuring the insurance, he is not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was wilful, and with the fraudulent design to enable the owner to make insurance after the total loss, the owner not being conscious of any such act or design at the time of such insurance." The judge then went into a minute examination of the facts in the case, and left it to the jury, who returned a verdict for the plaintiff.

<sup>1</sup> *Genl. Int. Ins. Co. v. Ruggles*, 12 Wheat. 408. The facts in this case are stated in the preceding note. It was heard on appeal from the First Circuit; Mr. Justice *Thompson* held: "It is no doubt true with respect to policies of insurance, or as to all other contracts, that the principal is responsible for the acts of his agent; and that any misrepresentation or material concealment by the agent is equally fatal to the con-

in giving the decision of the court, goes also much further, and holds that the policy is not to be defeated by misrepresentation or concealment, unless these are made by the assured or by some agent of his who is employed to procure the insurance ; and that, as the master has no such agency, his acts cannot be imputed to the owner. This statement, however, must be considered as *obiter*, because not necessary to the decision of the case. We have never been satisfied with Judge Story's reasons for his decision ; for it cannot be supposed that the master is at once and totally discharged from all agency for, or duty or responsibility to, his owner, by the total loss of the vessel even with abandonment. He is commonly called the agent of the underwriters after their acceptance of abandonment, but may even then remain for some purposes and to some extent the agent of the owners. We cannot say from definite authority that a policy made under a material misunderstanding by both of the parties, caused by the fraud of any agent of either of them, is necessarily void ; but we think this is a fair statement of what is, or ought to be, the law.

One important consequence from the distinction between a war-tract as if it had been the act of the principal himself. But such responsibility must, of necessity, be limited to cases where the agent acts within the scope of his authority. In the present case the master was clothed with no authority or agency in any manner connected with procuring insurance. The misconduct charged to him occurred, not while he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of the total destruction of the whole subject-matter of the agency ; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent at the time of the alleged misconduct. It is said that, if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear that this end would be best promoted by adopting the rule contended for on the part of the underwriters. Cases may be very easily supposed where negligence or misconduct in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance. Although no adjudged cases directly applicable to the one before us have been found, we do not consider this decision as establishing any new principle in the law of insurance, but as grounded on the application of principles already settled to a new combination of circumstances. The judgment of the Circuit Court affirmed."

warranty and a representation has already been referred to. It is clearly expressed by Lord Mansfield thus: "A representation may be equitably and substantially answered, but a warranty must be strictly complied with."<sup>1</sup> This distinction, which is a matter of law, would be always applied to every representation, but with far less of indulgence, if with any, where the representation was fraudulent. We cannot better illustrate what the courts have meant by a substantial compliance with an innocent representation, than by the cases in our notes. Many of these cases have been cited before for other purposes; and some of them will show that a very small difference between the representation and the fact will be held to negative the plaintiff's claim of substantial compliance, because, as the courts say in one case, "the smallest difference is often very material"; and in such cases the distinction between warranty and representation practically disappears.<sup>2</sup> It must not be for-

<sup>1</sup> DeHahn v. Hartley, 1 T. R. 343.

<sup>2</sup> It was held in Pawson v. Watson, Cowp. 785, that a warranty inserted in a policy of insurance must be literally and strictly complied with, and that a representation to the underwriter need only be substantially performed, but if false in a material point it will avoid the policy. Bean v. Stupart, Dougl. 11, is a declaration that a warranty must be strictly complied with. Kirby v. Smith, 1 B. & Ald. 671. In Fillis v. Brutton, cited Park on Ins. 414, it appeared that a broker's instructions stated that the ship was ready to sail on the 24th of December. The broker represented that she was in port that day, when in fact she sailed on the 23d. This was held to be a material misrepresentation. Lord Mansfield said, that this was a material concealment and misrepresentation. The jury, however, hesitated; his lordship then laid down the following, as general principles: "In all insurances, it is essential to the contract that the assured should represent the true state of the ship, to the best of his knowledge. On that infor-

mation the underwriters engage. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only material point is, Had the ship sailed, or was she in port?" Upon this the jury found for the defendant. In Chaurand v. Angerstein, Peake, N. P. 48, where the representation was that the ship would sail in the month of October, and she did sail on the 11th, the evidence of commercial men was admitted to prove that, in mercantile usage, the phrase "in the month of October" was held to mean some time between the 25th of that month and the 1st or 2d of the succeeding month; the policy was declared void for misrepresentation which was material. Arnot v. Stewart, 5 Dow, 274. In this case a merchant in London, having an order from B, a merchant in Perth, for goods to be shipped from London for Dundee, sends the goods to the wharf on Saturday the 24th of February, the vessel there taking in goods for Dundee, being the K. (unarmed),

gotten that a representation may lose all its effect by a revocation before the policy is signed, and that this revocation may be made, not only by an express declaration of a previous mistake, or by a subsequent statement, which, by a reasonable implication, qualifies or controls a prior statement.<sup>1</sup> And if the policy, in express terms, is inconsistent with a previous representation, the insurers are not permitted by their policy to require even a substantial compliance with the representation.<sup>2</sup> We have repeatedly said, that, if a representation be fraudulent, it cuts off all inquiry, either into materiality or compliance. If innocent it may be entirely true, when the policy has attached, and subsequently become false; we should say that in such a case the policy would continue to attach, and the insurers would be liable for any losses occurring before the representation became falsified. If we suppose that the representation becomes, at some time after the policy attaches, false, so as to discharge the insurers, and at a still subsequent time becomes again true, it may be more difficult to decide whether the policy again attaches, and the liability of the insurers again commences, when the representation again becomes true. Let us suppose the insurance to be on cargo, and the insurers ask if there is to be a supercargo on board, saying that they should

which had been substituted by the shipping company for the D. (armed), the company announcing to all who inquired that the K. and not the D. was to sail on the 25th, Sundays and Thursdays being the regular sailing days. A despatches the invoice on the 27th of February, dated on that day, with advice that the goods had been sent by the D., not naming the 24th as the sailing day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March. The K. sails with the goods on the 25th of February, and is captured on the 2d of March by a privateer. Action brought by A against B for the price of the goods, and held below that he could not recover. The judgment

affirmed above, the Lord Chancellor being of opinion that if B. had insured upon the representation sent to him, he could not have recovered from the underwriters. In *Macdowall v. Fraser*, Dougl. 260, the representation was that a ship was seen safe on such a day, and had performed two thirds of her voyage if it should turn out that she had got as far as was represented. It afterwards appeared that the ship was lost two days before the day mentioned. The mistake was held material, and the policy was avoided. See p. 404, n. 1, *supra*, and cases there cited.

<sup>1</sup> See *Edwards v. Footner*, 1 Campb. 530, p. 436, n. 1, *supra*; *Dawson v. Atty*, 7 East, 366.

<sup>2</sup> *Lavabre v. Wilson*; *Bize v. Fletcher*; *Lavabre v. Walter*, Dougl. 284.



then think the risk less, and would insure on more favorable terms; and the insured answered, there will be a supercargo. And the supercargo, who sails in the vessel, leaves her at an intermediate port without any substitute, and rejoins her at a subsequent intermediate port; admitting that the liability of the insurers would cease while the supercargo was absent, we should say that it began again when he returned. We infer this from the distinction between a warranty and a representation. And, indeed, we see in our chapter on warranty that even sea-worthiness may cease for a time, and during that time suspend the liability of the insurers, and be again restored, and thereby restore their liability.

A representation may be true in part and false in part. If these be distinctly severable parts, with severable risks, we should say that the falsehood of the representation avoided the insurance only as far as it was false, leaving it valid as to the rest. But if the circumstances and nature of the contract and of the risks are such that this partial misrepresentation affects the whole risk, the whole insurance is avoided.<sup>1</sup> There are,

<sup>1</sup> *Marshall v. Union Ins. Co.*, 2 Wash. C. C. 357. This was an action on four policies; one on the vessel, another on the cargo, a third on the freight, and a fourth on additional cargo, effected in October, 1806. The additional cargo consisted principally of goods brought by a Spaniard from Cadiz to New York, and entered for exportation for the benefit of the drawback. These goods were afterwards sold by the Spaniard to one Cazenove, recently and before they were shipped, and sold by Cazenove to the plaintiff. The policies contained the usual warranty of neutral property, to be proved here, and against illicit or prohibited trade. The defendant was informed that five Spaniards, with passports, were to be passengers in the vessel to Carthage; but that any part of the cargo had been brought by one of these passengers from Spain, and had been recently sold by him to the plaintiff, was not disclosed.

The vessel, after having her papers taken away at sea by a British vessel, was again detained by another British vessel, carried into Jamaica, and condemned. The objections to the recovery were, first, that there were strong circumstances in the case to show that the sale by the Spaniard was not *bona fide*, and that the apparent sale was as a cover; and, secondly, that the circumstance of part of the cargo having been brought from Spain, and recently sold by one of the passengers, ought to have been disclosed. Three presidents of insurance offices were examined, and they all gave it as their opinion that those circumstances were material. Two of them said that a disclosure of them would have increased the premium. The third said that it would have led him to inquire into the fairness of the transaction; but that, if he had found it *bona fide*, it would have made no difference to him. Mr. Justice



however, many cases under fire policies, the reasoning of which might apply as well to marine policies, in which it is held that a false warranty or statement respecting a part of the property insured avoids the whole policy.<sup>1</sup> If an innocent representation is true when made, and subsequently becomes untrue, it has no retroactive effect, the insurer being held for losses which occurred before the falsity of the representation.<sup>2</sup> It must be remembered,

*Washington*, in charging the jury, observed: "That it was for them to weigh the evidence, and to decide whether the sale was *bona fide* or not. If not, it was a fraud upon the neutrality of the United States, as well as upon the defendants, and amounted to a breach of warranty in the policy on those goods. That, if the jury should be satisfied upon this point against the insured, it would be sufficient to avoid all the policies upon the ground of concealment, because, although the taint upon a part of the cargo would not, or ought not, cause the condemnation of the whole, or of the vessel, yet it would necessarily occasion a seizure, detention, and expense, if not danger to the whole, and would, at all events, give a right to the insured, on hearing of the capture, to abandon. The insurer calculates, not only the risk of condemnation, but of capture and detention; and a concealment of circumstances which may produce the latter must be material to the risk, and would, if known, increase the premium."

<sup>1</sup> In *Smith v. Empire Ins. Co.*, 25 Barb. 497, it was held that where the same policy insures the house and furniture, though at a separate valuation, as the policy is void as to the building by reason of a false warranty as to an encumbrance thereon, it is void as to the furniture also, although there is no encumbrance upon the furniture. This case overrules *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122, which case was also doubted in *Wilson v. Her-*

*kimer Ins. Co.*, 2 Seld. 53. In *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342, two buildings were separately insured at a separate valuation in the same policy. One of the buildings was alienated by the insured, and it was contended that this avoided the policy as to both. *Fletcher, J.*, said: "But the shop was valued separately, and was insured separately, as a separate, distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would, no doubt, avoid the policy *pro tanto*, and only *pro tanto*. The tavern, house, and shop being insured separately, the alienation of one would no more affect the insurance on the other than if they had been insured in separate policies. In *Brown v. People's Mut. Ins. Co.*, 11 Cush. 280, real and personal estate were insured at a separate valuation in the same policy. One premium note for the whole insurance was given, and the policy secured a lien on the whole property insured, to secure the payment of assessments. The real estate was encumbered by a mortgage, which was not disclosed to the insurers, and it was held that the policy was void as to the whole amount insured." The court said: "The contract being entire, and one premium note being given, the lien for the security of the same was affected by the misstatement."

<sup>2</sup> In *Driscoll v. Passmore*, 1 B. & P. 200, insurance was effected on a voyage

however, that the effect of a misrepresentation, in avoiding the policy, does not usually depend in any degree upon the connection of the loss with the fact misrepresented.

We have already seen, that, if the misrepresentation be fraudulent, there will be no inquiry into its materiality. But if it be honest, it effects the policy only if material. But the question arises, and has been much considered, whether the materiality of a misrepresentation or a concealment is a question of law which the court determines, or a question of fact to be submitted to the jury.<sup>1</sup> We

from Lisbon to Madeira, from Madeira to the coast of Africa, and from thence back to Lisbon. When the vessel arrived at Madeira, the crew refused to go farther, being alarmed at certain reports of pirates, and the vessel was forced to return to Lisbon, and thence sailed to the coast of Africa. It was held, that the policy attached, and that the insured could recover, the vessel having been lost. *Scott v. Thompson*, 1 B. & P., N. R. 181. In this case the policy was against sea risk and damage by fire only. In the course of her voyage the ship was carried out of her course by a vessel of war, but, being afterwards released, proceeded on the voyage insured; and, while so proceeding, the goods insured sustained sea damage. Held, that the underwriters were liable for this loss.

<sup>1</sup> In *Firemen's Ins. Co. v. Walden*, 12 Johns. 513, the following language is used by the court: "It is a well-settled principle in the law of insurance, that what facts in the knowledge of the assured are material, and necessary to be communicated to the underwriter, when insurance is requested, is for a jury to determine; and I will briefly notice a few cases in illustration of this point. In *Macdowall v. Fraser*, Doug. 260, it was assumed by the K. B. as a given point, and it was said expressly by one of the judges, that the materiality of a

certain representation to the underwriters was proper for the consideration of the jury; and in the case of *Shirley v. Wilkinson*, Doug. 206, note, which came before the same court two years afterwards, Lord *Mansfield* and the rest of the court were of opinion, that if the assured, at the time when the policy was effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and if what he conceals shall appear material to the jury, they ought to find for the underwriter, though the concealment should have been innocent. The next case is that of *Willes v. Glover*, 4 B. & P. 14, in which the Court of C. B. admits the same doctrine; and on the question whether the concealment of a certain letter was material, the court held the verdict to be against evidence, and awarded a new trial; and they declared, that, although great respect was due to the opinion of the jury, still they thought that their judgment on that point had been too hastily formed, and that the case ought to be reconsidered. In *Littledale v. Dixon*, 4 B. & P. 151, the same court unanimously and very explicitly declared their opinion, that every material circumstance must be disclosed, but that it was for the jury to say how far any given circumstance was material. From these

think, however, that it is now the settled rule in this country that it is a question of fact, although, as we have seen, if the representation be in answer to a specific question, there is an almost conclusive presumption of its materiality.<sup>1</sup> And there are subjects of

cases it appears that the principle is settled in the English courts. In *Livingston v. Delafield*, 1 Johns. 522, the Supreme Court of New York declared that, whether certain information which the assured knew, and did not communicate, became material, was a question of fact that the jury were to decide; and the same doctrine had been previously advanced by the most distinguished counsel, Hamilton and Harrison, and evidently acquiesced in by the court in a case which arose some years before. *Barnewell v. Church*, 1 Caines, 229. So, in *Murgatroyd v. Crawford*, 3 Dallas, 491, in the Supreme Court of Pennsylvania, Chief Justice *Shippen* declared, that if, in the opinion of the jury, a knowledge of the circumstances that were suppressed would have induced the insurer to demand a higher premium, or to refuse altogether to underwrite, it would be sufficient to invalidate the policy. Again, in the case of *Marshall v. Union Ins. Co.*, 1 Cond's Marsh. 473, the court left it pointedly to the jury to judge of the materiality of the circumstances not disclosed. And the Supreme Court of the United States has decided on two different occasions, *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, and *Maryland Ins. Co. v. Rudens*, 6 Cranch, 338, that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality was a subject for the consideration of a jury, and must be left to them. One of these cases came up on error, founded on bill of exceptions taken at the circuit, and the court say that the effect of a misrepresentation or concealment depends

on its materiality to the risk; and this must be decided by a jury, under the direction of the court; and in that case, said the Chief Justice, it had not been decided, and consequently a *re-nire facias de novo* was awarded, to the end that a jury might pass upon the question of a material concealment. It is thus settled, so far as authority goes, beyond all doubts or contradiction, that whether the matters not disclosed in an application for insurance were material is a question to be submitted to the consideration of a jury." In *M'Lanahan v. The Universal Ins. Co.*, 1 Pet. 170, Mr. Justice *Story* says: "The opinion of this court, in *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, was acted upon in the Court of Errors in New York in the case of the *New York F. Ins. Co. v. Walden*, 12 Johns. 513 *supra*, where Mr. Chancellor *Kent* laid down the doctrine in a manner which merits our entire approval. We think, then, that the exception insisted upon at the bar cannot, upon principle or authority, be supported; and that the question of materiality of the time of sailing of the ship to the risk is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law."

<sup>1</sup> See p. 413 n. 2, *supra*, and cases there cited.

representation, as neutrality, convoy, time when heard from if she is a missing ship, and the like, which are conclusively determined to be material.

The question may arise, what degree of falsity in a misrepresentation is sufficient to avoid the policy. If it be innocent, we should say that the principle which requires the subject-matter of the representation to be material would equally require that its falsity should be material. And the test of this must be the universal one, — Would the insurers have made that policy on those terms had they known the truth? If the representation is honestly made, and is true when made, and is falsified by some third party, with no fault whatever on the part of the insured, the effect of this may not be certain from the authorities. We should say, however, that the absence of fraud on the one hand, and on the other the distinction between a warranty and a representation, would lead to the conclusion that the policy would not be avoided by a representation, looking to the future, unless it was expressed in terms which carried the obligation of a promise.<sup>1</sup> Even then its falsity may be excused. The causes that excuse the breach of a warranty must have at least an equal effect in the case of a repre-

<sup>1</sup> In *Flinn v. Tobin*, 1 Moody & W. 367, it was held, that it is no defence to an action on a policy of insurance, that a misrepresentation was made of the cargo with which the ship was to sail on a future day, although in fact that representation induced the defendant to sign the policy, unless the misrepresentation was fraudulently made. It was represented, when the policy was effected, that the ship would have on board fifty or sixty tons of rock salt, which would put her in light-ballast trim. She actually sailed with a hundred and fifty tons, and was lost. Lord *Tenterden*, C. J., in summing up to the jury, said: "I think the defendant in this case will not be entitled to a verdict, unless he satisfy the jury that there was a fraudulent misrepresentation of the cargo which the vessel was to carry. If he does so, the plaintiff cannot re-

cover; but the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which cannot be varied by parol. No defence, therefore, which turns on showing that the contract was different from that contained in the policy can be admitted." The jury found for the plaintiff. It was held, in *Flinn v. Headlam*, 9 B. & C. 693, "where the agent of a ship-owner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk, that the jury were warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy."

sentation.<sup>1</sup> The rule must be that the non-performance of the promise does not discharge the underwriters when it arises from causes entirely beyond the control of the insured, and is, so far as he is concerned, inevitable. Our notes will show some cases in which this rule has been applied.<sup>2</sup>

<sup>1</sup> In *Eden v. Parkinson*, Dougl. 733, a Dutch ship and cargo were insured, "at and from L'Orient to Rotterdam, both warranted neutral property." The ship being captured by an English man-of-war, an action was brought on the policy; and the declaration stated that the defendant subscribed the policy on the 28th of November, 1780, and averred that the ship and cargo were at that time neutral property. Upon the trial it appeared, that the ship sailed from L'Orient on the 11th of December, 1780, and both ship and cargo were then neutral property, and so continued till the 20th of December, when, hostilities having commenced between the English and the Dutch, the ship and cargo ceased to be neutral property, and were taken on the 25th of December, and condemned as lawful prize. The court upon this case were clearly of opinion that the plaintiff was entitled to recover. Lord *Mansfield* said: "The insured warranted the ship and cargo neutral property, and the defendant would have the court to add, by construction, 'and so shall continue during the whole voyage.' The contract was not so. The insured told the state of the ship and goods then, and the insurers took upon themselves all risks of future events." The same point was ruled in *Saloucci v. Johnson*, Park on Ins. 364, and admitted in *Tyson v. Gurney*, 3 T. R. 477. See also, 3 Blackstone's Comm. 165.

<sup>2</sup> There are two classes of cases in which non-compliance with a promissory representation does not avoid the

policy: the first, when by act of government a representation of neutrality is rendered untrue, as in *Eden v. Parkinson*, Dougl. 733, in preceding note; and the other, when a vessel is warranted to sail with convoy, and is separated from the convoy by stress of weather. The learned author of *Marshall on Ins.* remarks, p. 279: "By this warranty, the insured undertakes not only to depart, or to sail, with convoy, but also to do all in her power to continue with such convoy during her voyage, or so much of it as is usual and necessary, and not to separate from it unless compelled by necessity. This is all that the warranty requires, and all that the insured can absolutely undertake to do." Thus, in *Jeffrey v. Legendra*, 2 Salk. 443; S. C. 1 Show., 320; 4 Mod. 58; a ship was insured "from London to Naples, warranted to depart with convoy." The ship did depart from the port of London, in company with the convoy, but two days afterwards was separated from it by a storm. The convoy put into Torbay, and the ship insured into Fowrey in Cornwall. Three days afterward, the wind setting right to bring the convoy down the channel, the ship sailed from Fowrey to meet the convoy, but it did not come, and the ship, meeting with another storm, was driven on the French coast, and there taken. Upon this case it was decided, after great consideration, that the insured was entitled to recover, there being no neglect or default in the master of the ship.

## CHAPTER XIV.

## OF CONCEALMENT.

THE effect of concealment upon the policy is almost identical with that of misrepresentation. The common doctrine is, that any concealment which is either fraudulent or material discharges the insurers. It may be doubted, however, whether, strictly speaking, it must not be always material. It would be considered fraudulent if it was intentional, that is, if the information was withheld because the insured believed that it would be regarded as material, and would therefore affect him injuriously. If, however, it was certain that this information was in itself so absolutely non-material, that it could not possibly affect the mind or actions of the insurers, we have no good authority for saying that it would discharge them.<sup>1</sup> Lord Mansfield has said<sup>2</sup> that a concealment is

<sup>1</sup> In *Seaman v. Fonnereau*, 2 Strange, 1183, it was held, in substance, that every fact and circumstance which can possibly influence the mind of the insured, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Whatever respects the state of the ship, the time of her sailing, the nature of the employ in which she is to be engaged, &c., ought to be fully and explicitly disclosed; and the keeping back of any fact of this sort will be fatal to the policy. And, in such case, the concealment so vitiates the policy, that it will afford the insured no remedy, even against a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered with reference, not to the event, but to its effect at the time of making the contract. Marshall on

Ins. 348. An anonymous case in Skinner's Rep. 327, reads: "Upon evidence in an action upon a charter-party, the case was, that J. S. insured for him and such as should have goods upon such ship; and A. B. brought an action upon the charter-party, and made averment he had goods upon the ship, and held good; but per *Holt*, C. J., if the goods were insured as the goods of an *Hamburgher* who was an ally, and the goods were the goods of a *Frenchman*, who was an enemy, this is a fraud, and the insurance is not good." In *Elton v. Larkins*, 5 C. & P. 385, *Tindal*, C. J. said: "The question is, whether there has been a material concealment of facts which the plaintiff knew, and which the underwriter would require to enable him to decide. A material concealment is a concealment of facts, which, if communicated to the party

<sup>2</sup> *Carter v. Boehm*, 3 Burr. 1905.



fatal only when it relates "to the efficient motives and the precise subject of the contract." But the concealment will avoid the policy, although not intentional or fraudulent, and whether it arises from mistake, inadvertence, or ignorance of their materiality, if it is a concealment of material facts.<sup>1</sup> And if it is

who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium." *Willes v. Glover*, 4 Barb. 14. Mr. Justice *Shippen*, in *Murgatroyd v. Crawford*, 3 Dallas, 491, held: "If, in the opinion of the jury, a knowledge of circumstances that were suppressed would have induced the insurer to demand a higher premium, or refuse altogether to underwrite, it will be sufficient, on commercial principle, to invalidate the policy."

<sup>1</sup> In *The Union Ins. Co. v. Storey, Harper*, 235, insurance was effected on a vessel, at and from Charleston to Marseilles, and at and from thence to Havana. A separate policy on the cargo was executed on the same day, "from the loading thereof at Charleston." In the offer of the plaintiffs, on which both policies were effected, every material circumstance was said to be disclosed. In fact the vessel had been laden at Havana, and had touched at Charleston; the goods were not landed in Charleston, and the manifest showed that they were shipped in the names of Spaniards. It was held, that the omission to disclose these facts, Spain and her colonies being at war, was such a concealment of material circumstances as vitiated the policy of the vessel. *Biays v. The Union Ins. Co.*, 1 Wash. C. C. 506. In this case Mr. Justice *Washington* held: "It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power material to the risk, and if he omit to do so, the policy is void. If he

communicates all the information which he has honestly obtained, he cannot be charged with misrepresentation or concealment, if it should afterwards turn out that his informant knew more than he had disclosed, or had stated it untruly. I say honestly obtained; because, certainly, if for fraudulent purposes he avoided obtaining a full and true disclosure, the consequence would be the same as if he himself had misrepresented the information given to him." *Neptune Ins. Co. v. Robinson*, 11 Gill & J. 256. It was held by Mr. Justice *Seawall*, in *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 330, that "a mistake or omission in the representation of a risk, whether wilful or accidental, if material to the risk insured, avoids the contract." *Marshall on Ins.* 339; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *Fitzherbet v. Mather*, 1 T. R. 12. In *Bridges v. Hunter*, 1 M. & S. 15, where the plaintiffs effected a policy of assurance on wines from Oporto to London, on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto, the first of which, dated the 11th of October, stated thus: "We are loading the wines on the Stag, Capt. Wheatly, who pretends to sail after to-morrow"; the other, dated the 13th of October, enclosed the bills of lading, which were filled up "with convoy," which letters the plaintiffs did not communicate to the underwriters; held, that it was a material concealment. In *Burritt v. The Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188, the conditions annexed to a policy issued by a mutual



proved that material facts are not disclosed, it is not always necessary to constitute a concealment that these facts were actually known to the assured. It is enough if he might have known them, and ought to have known them; for it is certainly his duty to use all customary and reasonable means to acquire all the information which it is his duty to impart. And this means all the information which the insurer ought to have in making his bargain, and which he may reasonably believe the insured possesses.<sup>1</sup>

insurance company, after providing that all applications for insurance should be in writing according to the printed forms prepared by the company, further provided that the applications should state the relative situation of the building insured in respect to all other buildings standing within ten rods, and that any misrepresentation or concealment in the application should render the policy void. The printed form of application prepared by the company and used by the assured contained a note in the margin thus: "Relative situation as to other buildings, distance from each if less than ten rods"; and in the blank opposite to this the assured inserted a description of five buildings which stood within the distance specified, but omitted to mention several others which stood within the same distance. Held, that the omission, however innocent, was fatal to the policy, and this whether material to the risk or not. See *post*, p. 472, n. 1, and p. 481, n. 1.

<sup>1</sup> *Neptune Ins. Co. v. Robinson*, 11 Gill & J. 256; *Biays v. The Union Ins. Co.*, 1 Wash. C. C. 506. In *Wake v. Atty*, 4 Taunt. 493, a broker, in pursuance of instructions previously received from Sunderland, effected insurance at Lloyd's, at a time when a letter lay on his table at the Coal Exchange announcing the ship's loss. This was held to be no such want of diligence as avoided the policy. In *Hoyt v. Gilman*,

8 Mass. 336, the action was case upon a policy of insurance on the ship *Ariadne* and her freight from Falmouth to her port of discharge in Europe. The defence was concealment of a fact materially affecting the risk. It appeared that the insurance was procured by the son of the plaintiff, acting as his agent; and that, at the time it was effected, the plaintiff had in his possession a letter to the effect that insurance on this same risk could not be procured in London, on account of an edict of the French Emperor, confiscating all vessels entering the Jade, to which the *Ariadne* was bound. This information was not communicated either to his agent or to the defendant. The court held: "Whether fraud be a question for the court or jury, yet if, upon the facts in evidence in this case, the jury had given the plaintiff his premium, we should not have hesitated to set aside the verdict. The letter which the plaintiff concealed contained information very material in estimating the risk. The plaintiff must have been aware of this, if he had capacity to enter into a contract. The underwriter had a right to the information. The withholding it from him must be considered fraudulent, and the insurance was therefore void. And, being avoided for such a cause, the plaintiff is not entitled to a return of his premium." *Blagge v. New York Ins. Co.*, 1 Caines, 549.

The question, what degree of diligence he must use, whether the utmost possible diligence or only that which an honest and rational man would exert, if only his own interests are concerned, has been considered,<sup>1</sup> and the conclusion is that it is this last measure of diligence to which he is bound.<sup>2</sup> If the concealment

<sup>1</sup> See chapter on Representation, *supra*, p. 438, and cases there cited.

<sup>2</sup> In *McLanahan v. The Universal Ins. Co.*, 1 Pet. 170, fully stated on p. 438, *supra*, Mr. Justice Story (p. 185) held: "The contract of insurance has been said to be a contract *uberrimas fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss has occurred which, by reasonable diligence, might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud, for under such circumstances the maxim applies, *qui facit per alium facit per se*. His own knowledge, in such a case, infects the act of his agent in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to the disclosure of all material facts which it was in the power of the party to communicate by ordinary means, and the omission is fatal to the insurances. The true principle, deducible from the authorities on this subject, is, that where a party orders insurance, and afterwards

receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by *Watson v. Delafield*, 1 Johns. 152, 2 Caines, 224, 2 Johns. 526, where most of the early cases are collected and commented upon. We do not go over the cases at large, because there is no controversy as to the general rule. The only matter for observation is, whether the rule as to diligence may not, in certain cases, be somewhat more strict, so as to require what, in *Andrews v. Mar. Ins. Co.*, 9 Johns. 32, is called 'extreme diligence,' or what, in *Watson v. Delafield*, is left open for discussion, as extreme diligence,—the duty of communication, where the countermand may not only possibly but probably arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence to be judged of, and all the circumstances of each particular case, and that the expressions thrown out into the cases above mentioned were not so much intended to point out a stricter rule as to intimate that there might be cases in which a very prompt effort for communication

of a material fact be made by an agent in effecting the insurance, it affects the insured in the same way as if he made it himself, and the cases already cited will show that if the agent be ignorant by design or gross negligence, it avoids the policy.<sup>1</sup> If the insured is in possession of material intelligence, and withholds it, the policy will be defeated, although events may prove that the intelligence was wholly unfounded.<sup>2</sup> Hence there is no safety for the insured

might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous, or where, from the lapse of time, or the date of the order for insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to strong suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence."

<sup>1</sup> *Hoyt v. Gilman*, 8 Mass. 386; and language of Mr. Justice *Story* in *McLanahan v. The Universal Ins. Co.*, 1 Pet. 170, cited in preceding note.

<sup>2</sup> In *Seaman v. Fonnereau*, 2 Strange. 1183, the facts were, that, on the 25th of August, 1740, the defendant underwrote a policy from Carolina to Holland. It appeared the agent for the plaintiff had, on the 23d of August, received a letter from Cowes, dated 21st August, wherein it was said: "On the 12th of this month I was in company with the ship *Davy* (the ship in question); at twelve in the night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship, however, continued her voyage till the

19th of August, when she was taken by the Spaniards; and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated the 27th of June before. Several brokers were examined, and proved that the agent ought to have disclosed the letter, for either the defendant would not have underwritten, or would have insisted upon a higher premium. And the Chief Justice was of that opinion, and declared that, as these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material that the loss was not such a one as the letter imported, for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events; he therefore thought it a strong case for the defendant, and the jury found accordingly. It was held in *Lynch v. Hamilton*, 3 Taunt. 36, S. C. 14 East, 494, that an insurer is bound to communicate to the underwriters any intelligence he has which may affect his choice as to whether he will insure at all and at what premium he will insure, whether, in fact, true or false. If a ship is advertised to be in danger, and the insurer effects a policy on the ship or ships, knowing that the ship in danger is one of them, without stating the ships' names, this is a concealment which avoids the policy, al-

or the agents of the insured, except in disclosing everything they know which can possibly be material. For if on trial the fact appears to be material the policy will be avoided, although the concealment was in no degree fraudulent, and arose from a mere error of judgment.<sup>1</sup> One distinction made in the case of representation seems to be equally applicable to concealment. If a specific question is asked by the insurers, and the insured makes no answer, he would be estopped from denying the materiality of the concealment. And this rule is applied to matters concerning sea-worthiness, or other things covered by the warranty, implied or express, concerning which nothing need be said unless in reply to a specific

though the rumor was false. In *Hoyt v. Gilman*, 8 Mass. 336, the fact of the French Emperor's having issued an edict declaring confiscate all vessels found in the Jade or entering it, to which river the vessel on which insurance was effected was bound, was known to the insured, and by him withheld from the underwriters, the policy was held void, though the ship was in fact lost by a peril of the sea.

<sup>1</sup> In *De Costa v. Scandrett*, 2 P. Williams, 170, S. C. 2 Eq. Ca. Abr. 636, one having a doubtful account of his ship that was at sea, viz. that a ship described like his was taken, insured her without giving any information to the insurers of what he had heard, either as to the hazard or circumstances which might induce him to believe that his ship was in great danger, if not actually lost. The insurers brought a bill for injunction, and to be relieved against the insurance as fraudulent. The Lord Chancellor *Macclesfield* held: "The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it; for if

this had been discovered, it is impossible to think that the insurers would have insured the ship at so small a premium as they have done, but either would not have insured at all, or would have insisted on larger premium; so that the concealing of this intelligence is a fraud. Wherefore, decree the policy to be delivered up with costs, but the premium to be paid back, and allowed out of the costs." In the note to *Barber v. Fletcher*, Dougl. 306, is the following: "In the case of *Shirley v. Williamson*, which came on in Q. B., M. 22 Geo. 3, upon a motion for a new trial, Lord *Mansfield* and the rest of the court were clearly of opinion that, if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear material to the jury, they ought to find for the underwriters, the contract in such a case being void, although the concealment should have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account."

question.<sup>1</sup> If, after the policy is made, it be regarded by the parties, from some mistake in it or from some other cause, as insufficient or inaccurate, and be altered by consent, the necessity of a full and true statement of all the information possessed by the insured, respecting the subject-matter of the risk, applies with as much force as when a policy is originally made.<sup>2</sup> And if the insurer

<sup>1</sup> In the case of *Hayward v. Rogers*, 4 East, 597, Lord *Ellenborough* observes: "It certainly would have weight in guiding the judgment of the underwriter to know how old the ship was, whether copper-bottomed or not, what repairs she had received, and when and in what dock these repairs were done to her, and how lately before the voyage insured; and if the voyage were, as this was, a voyage home, what accident the ship had met with on the outward voyage. All this may be very proper and convenient for an underwriter to be informed of before he takes upon him the risk, and all this may be asked of the assured; and if he should withhold, on being asked for it, any material fact of such required information, his policy could not be sustained for a moment; for such a suppression would be a fraudulent concealment of material facts, which has always been considered as avoiding the policy. But the question is, Is it the duty of the assured, in the first instance, and as a condition precedent on his part, to inform the underwriters of all these circumstances to the extent of his, the assured's, own actual knowledge on the subject? This question is answered in the negative on two grounds: 1. That the underwriter is virtually indemnified against, or exempted from, the effect of these circumstances, whether disclosed or not, as far as they render the ship not a proper object of insurance; for if on these or any account whatsoever, the ship be not sea-worthy at the com-

mencement of the risk, the underwriter is discharged from, or rather never incurred, any responsibility with respect to it. 2. From the reason of the thing, and the almost absolute impossibility for the assured to state and bring forward (without any specific inquiry or request for information having been addressed to him on the part of the underwriter relative thereto) everything which, if stated, might have been deemed, in the judgment of the underwriter, material to the question whether he should underwrite at all, and, if so, at what premium." 1 Arnould on Ins. 569 (Perkins's Am. ed.). In *Popleston v. Kitchen*, 3 Wash. C. C. 138, Mr. Justice *Washington* "stated that the plaintiff was not required to communicate the age of the vessel, or where built, unless it had been asked of him." The doctrine of *Hayward v. Rogers* is supported in this country in *Walden v. The N. Y. Firemen's Ins. Co.*, 12 Johns. 128, where it was held, that the insured, unsolicited, is not bound to disclose circumstances relative to the sea-worthiness of the ship, or facts showing carelessness or want of economy in the master, provided they do not tend to impeach his honesty. See also *De Wolf v. N. Y. Firemen's Ins. Co.*, 20 Johns. 214; 3 Kent, Comm. \*385.

<sup>2</sup> *Sawtell v. Loudon*, 5 Taunt. 359, 1 Marsh. 99. In this case, which was an action upon a policy of insurance from Bristol to Port Mahon, with liberty to touch at Gibraltar, it appeared that the plaintiff had instructed his broker to

seeks reinsurance, he is bound to communicate all the material information he possesses, although acquired since he made his policy, as well as all representations made to him when he made the policy; and any concealment, designed or inadvertent, of circumstances material to the risk affects the policy in the same way that it would affect it in the case of original insurance. In one case in New York the obligation of the insured seeking reinsurance is carried still further than that of one originally insured. It has never been held or supposed that the insured was bound to disclose either facts or reports affecting his own moral character; but in this case the insured seeking reinsurance was held bound to communicate whatever information he possessed concerning the moral character of the person he had insured, if it had a definite bearing on the risks he desired to cover.<sup>1</sup> This action was upon a

effect insurance on goods by the *Sophia*; but the broker, through mistake, effected a policy on the ship *Sophia*. One of the underwriters informed the broker that a ship of this name was reported at Lloyd's as at sea without convoy, and the broker wrote to his principal, asking if this was the vessel insured. In his reply the plaintiff notified the broker of the mistake made in the subject of insurance, requesting him to have it rectified, and added: "The *Sophia* you allude to is the ship on which you effected the insurance; I chartered the brig, and she was to have gone to Falmouth, as I understand, to join convoy, but I suppose the wind was contrary, and she could not fetch the port, but know nothing about it myself." The broker applied to the underwriters to make the change desired, and it was done, but the plaintiff's letter was not communicated to them. The ship was, in fact, blown out to sea, and, after trying in vain to make Falmouth, and join her convoy there, sailed alone for Gibraltar and was lost. It was contended for the defendants that the concealment of this letter avoided the policy, and the court so held.

<sup>1</sup> *The New York Bowery Fire Ins. Co. v. The New York Fire Ins. Co.*, 17 Wend. 359. This was an action against the Bowery Ins. Co. on writ of error, on a policy of reinsurance. On the 3d day of February, 1834, the New York Fire Ins. Co. entered into a policy to insure for one year one Joseph Mortimer against loss or damage by fire upon his stock of goods and household furniture. On the 11th day of February, the insurers applied to the Bowery Company for reinsurance on the dry goods, and the latter wrote a policy accordingly. One of the many conditions contained in this policy of reinsurance was in effect "that they should produce the certificate of a magistrate or notary-public, that he had examined the circumstances attending the fire, that he was acquainted with the character and circumstances of the assured or claimant, and that he verily believed they had by misfortune, and without fraud or evil practice, sustained loss, &c., and until such proofs, &c., were produced, the policy should not be payable." Loss having occurred, the company paid the policy, and then brought their action against the Bow-



fire policy, but the reasoning which led to the decision would seem to be as applicable to a marine policy.

ery Company on the policy of reinsurance. On the trial, the counsel for the defendants raised the point, that the action of the New York Company in transmitting as proofs of loss the papers received from Mortimer was not sufficient; that the plaintiffs were bound to make the affidavits required by the conditions, and furnish their own preliminary proofs, before they could recover from the Bowery Company. The presiding judge in the Court of Common Pleas overruled the objections, and the defendants appealed. The defendants then proved that, after the plaintiffs had entered into the policy of insurance with Mortimer, and previous to the application for reinsurance, the secretary of the plaintiffs received satisfactory information that the character of Mortimer was bad; that he had been insured and twice burnt out, and that he was in bad repute with the offices; and that this information was not communicated to the defendants at the time of applying for the reinsurance. The jury were charged that if they should find this information material, and that it was *wilfully withheld*, the defendants should recover. Defendants objected. Verdict for plaintiffs. The defendants sued out this writ of error. *Bronson, J.*, held: "No doubt seems to have been entertained by the judge, that the information communicated to Merchant, the secretary of the plaintiffs, gave rise to a question of some kind for the consideration of the jury. The facts stated to Merchant were calculated to make a strong impression on the mind of an underwriter for Mortimer; and if they had been communicated to the defendants at the time of making the applica-

tion for the reinsurance, it can hardly be doubted, that they would either have demanded a greater premium, or declined the risk altogether. If neither of these courses had been adopted, they would at least have taken time to inquire concerning the character of Mortimer. It is true that Thorne, the informant, did not, with absolute certainty, identify the Mortimer with whom he spoke with the one insured by the plaintiffs; but there remained but little more than a mere possibility that there were two persons of that name answering to the same description. The witness gave not only his surname, but his occupation, which was not of a kind likely to include a great number of individuals. This was not all. He gave the place of his residence, and the street in which he carried on business. No doubt seems to have been entertained by Merchant that the person insured by his company was identical with the person of whom Thorne spoke, and none could well have been entertained by any one. But if there was any uncertainty about the person, the value of the evidence was to be estimated by the jury, under proper instructions from the court. The information which the plaintiffs possessed, and which they withheld from the defendants, was, I think, material to the risk. It seems to have been so regarded by the plaintiffs themselves. The policy to Mortimer was issued by Merchant on the 3d of February, in the absence of the president of his company. When the president returned the next day, he disapproved of what had been done, and ordered a reinsurance. But nothing was done by Merchant, the secretary, because, as he



No representation needs be made of facts or intelligence which were known to the insurers, or which it may be presumed they

said, he thought it a good risk, and hoped to remove the president's objections. He adds, he thought he had nearly quieted the fears of the president, and persuaded him to keep the risk. That he was right in this supposition was rendered highly probable by the fact, that although the president expressed his disapprobation and ordered reinsurance on the 4th of February, nothing was done until the 11th, and after the conversation with Thorne. After learning the character of Mortimer, no time was lost in applying for reinsurance. If the concealment of this information had, under proper instructions, been submitted to the jury as a question of actual fraud on the part of the plaintiffs, it is impossible to say that that verdict would not have been in favor of the defendants. But if the facts concerning Mortimer's character were material to the risk, it is enough that they were withheld by the plaintiff in applying for reinsurance. The general doctrine on this subject is not denied; but it is said that the character of Mortimer was not a fact material to the risk; and that the person applying for insurance is not bound to say anything about his own character. Had Mortimer applied to the defendants for insurance, he was not bound, nor could it be expected, that he should speak evil of himself. Good manners on the part of the underwriter, and self-respect on the part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source. But this case presents, I think, a different question. There was no law of

social intercourse forbidding the plaintiffs to speak of the character of a third person, especially in a matter of business, where character became an important inquiry. But it is said that Merchant might have subjected himself to an action of slander if he had repeated the words of Thorne, and it had turned out that they were untrue. I do not so understand the law. When a man, without any intent to defame, repeats, in the legitimate course of business, and for an honest purpose, what he has heard of the character of another, I have yet to learn that he is liable to an action if the information prove erroneous. Merchant had no legal excuse for withholding the information derived from Thorne, and I think he was bound to speak. The rule on this subject is very broad. 'Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material.' 1 Marsh. 467. He must give even doubtful news concerning the ship, in cases of marine insurance, however little credit he may give to it himself. 1 Marsh. 471. This question was not properly submitted to the jury. They were instructed, in effect, that, although they should think the information material, they must still find for the plaintiff, unless they should think it was intentionally withheld. There was no ground for submitting such a question to the jury. It was not raised by the evidence. And, besides, if the facts communicated by Thorne were material, it is enough that they were withheld by

knew. Even if the concealment of such facts was fraudulent,<sup>1</sup> we do not see that it can affect the policy ; for if the insurers knew the

Merchant on applying for reinsurance. Whether the omission was the result of mistake or design was not an important inquiry. The assured acts at his peril in withholding information. *Shirley v. Wilkinson*, Dougl. 306, note ; *Kohne v. Ins. Co. of N. A.*, 1 Marsh. Ins. 473, n. ; *Carter v. Boehm*, 3 Burr. 1909 ; *Thompson v. Buchanan*, 4 Brown, P. C. 482. The judgment is reversed, on the ground that the charge was erroneous, and a *venire de novo* is ordered in the court below."

<sup>1</sup> In *Vallance v. Dewar*, 1 Campb. 503, Lord *Ellenborough* thus lays down the rule of disclosure : " The rule is, that the broker must communicate what is in the special knowledge of the assured, not what is in the middle between them and the underwriter. He is not bound to make a laborious disclosure of what is known to all." Therefore, the underwriters are bound to know the nature and circumstances of the branch of trade to which the policy refers ; and, if the usage is general, it makes no difference that it is not uniform. See *Kingston v. Knibbs*, 1 Campb. 508 ; *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341 ; *Tierney v. Etherington*, Ib. 348 ; *Lyons v. Bridge*, Dougl. 512 ; *Hoskins v. Pickersgill*, Marsh. 727, *Durell v. Bederly*, 1 Holt, 289, note. In *Friere v. Woodhouse*, 1 Holt, 572, it was held, that, in effecting a policy of insurance, a circumstance of intelligence that has been inserted in Lloyd's list need not be communicated to the underwriters, however important it may be to the computation of the risk ; for it is to be presumed within their knowledge, and to be taken into account. Mr. Justice *Burroughs* remarked : " What is exclusively

known to the assured ought to be communicated ; but what the underwriter, by fair inquiry and due diligence, may learn from the ordinary sources of information need not be disclosed." *Elton v. Larkins*, 5 C. & P. 86, 385, S. C. 8 Bing. 198. It was held, in *Green v. The Merchants' Ins. Co.*, 10 Pick. 402, that although the officers of an insurance company may not, under all circumstances, be presumed to be acquainted with all the intelligence contained in the newspapers taken at their office, yet the general presumption is that they will examine, with some care, the items of marine intelligence, especially with reference to vessels belonging to their own port. In an action for a loss upon a policy of insurance, on a vessel underwritten by an insurance company, it was proved that a certain newspaper was taken by the defendants ; that in due course of the mail the number of the said newspaper, containing information of the time of the vessel's sailing, which was material to the risk, would have reached them before the policy was underwritten ; that this number was afterwards found on their files ; and the president of the company testified that he knew of the intelligence contained in it, though he could not recollect the source of his information. It was held that this number had been rightly admitted in evidence, and that it was properly left to the jury to decide whether it had been received, and its contents known to the president, before he signed the policy ; and also whether the information contained in it was the same as that contained in a letter produced at the trial, which had been received by the as-

facts, they knew that they were withheld from them, and it would be a fraud on their part to make the policy, intending to defeat it afterwards by relying on the concealment. Whether intelligence withheld from the insurers was known to them is a question of fact for the jury. But many cases have turned upon the somewhat different question, what knowledge may be attributed to the insurers by a presumption of law or fact. This question has arisen when the information had been made in some way or in some degree public. In London a shipping-list is publicly suspended at Lloyd's coffee-house, to which place all merchants and insurers are supposed to resort for mercantile intelligence. And in some English cases it has been held that intelligence there posted up in the usual way and place may be presumed to be known to London insurers who frequented that place.<sup>1</sup> This presumption, however, is only *prima facie*, and is therefore open to rebuttal; and in a recent case it was held that intelligence in the shipping-list did not prevent the insurers from defending against the policy, on the ground that a misrepresentation of the time of sailing had been made to them.<sup>2</sup> We have in this country no institution of precisely the

sured; and that, if it was the same, the omission to exhibit the letter, at the time of effecting the insurance, was not a material concealment. *Shaw, C. J.*, observed: "It may be very true that underwriters are not, under all circumstances, to be presumed to be acquainted with all the intelligence contained in the papers taken at their office. But the general presumption is, that the agents of the office will examine with some care those items of marine intelligence which are expressly designed speedily to diffuse intelligence upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port. Here it was proved that the Gazette in question was taken at the office; that, in due course of mail, it ought to have been received before the policy was effected; and that, upon search afterwards, it was found on file in its proper place. It was admitted by the president, though he testified that

he had no recollection of having seen that Gazette at the time of effecting the policy, still that he had heard of the arrival of the *Tatnall* at New York, by which the time of the sailing of the *Falcon* was reported, though he could not recollect the source of his information. The court are, therefore, all of opinion that the evidence was rightly admitted, and that it was properly left to the jury, as a fact, to decide whether this paper had been received, and its contents known at the office; and also whether the information contained in the Gazette was the same as that contained in the plaintiff's letter. If so, they were rightly instructed to consider the circumstance that such letter was not produced immaterial."

<sup>1</sup> *Friere v. Woodhouse*, 1 Holt, 572; *Elton v. Larkins*, 5 C. & P. 86, 385; S. C. 8 Bing. 198, in preceding note.

<sup>2</sup> In *Mackintosh v. Marshall*, 11 M. & W. 116, Lord Abinger, C. B., said:

same character or force as Lloyd's. The question here arises most frequently when the intelligence is contained in newspapers. The rule must be the same in this case as in all others of notice or knowledge. The statement in the paper must be brought home in some way to the knowledge of the party to be affected by it.<sup>1</sup> It is obvious that when the question relates to the knowledge of insurers, and statements in newspapers are to be brought home to them by proof, the strictness or directness of the proof must vary exceedingly in different cases. To take two extremes, an insurer in

"If a party subscribe a policy, relying on the representation of the party who comes to effect it, and this representation is not consistent with the list then at Lloyd's, it is no answer to it, because, though the underwriter may have access to such list, and may be presumed to have access to it, where there is nothing to mislead him, yet there may be something on which he relied that misled him; and when it is manifest that if he had adverted to the list he never would have taken the premium in question, it appears to me that in such a case the presumption that he had looked at the list is entirely rebutted; and it must be considered in this case, that, though he might have looked at the list, he did not, but relied on the representation made to him."

<sup>1</sup> In *Dickenson v. Commercial Ins. Co.*, Anthon, N. P. 92, it was held that marine intelligence published in the newspapers taken at the office of the underwriters need be stated. But this case turned somewhat on its peculiar circumstances. The plaintiff had applied at one office before he applied to the defendants, and was refused, on account of the news in the Gazette. The defendants took the risk at the usual rates, and the court held that the news should have been communicated. But see *Green v. Merchants' Union Ins. Co.*, 10 Pick. 402, p. 476, n. 1, and re-

marks of *Shaw*, C. J., there cited. See also *Alsop v. Commercial Ins. Co.*, 1 Sumner, 451. In *Storey v. Union Ins. Co.*, 1 Harper, 253, 3 McCord, 384, *nom* *Morey v. Union Ins. Co.*, 4 McCord, 511, the offer for insurance contained the following clause: "Every circumstance material for the underwriters to know, so as to form a just opinion of the risk, is stated in the above offer." The question was raised, whether the underwriters were discharged by the neglect of the assured to communicate intelligence which was contained in papers taken by the underwriters. It seems to have been held by the court, on the first two trials of the case, that the above clause amounted to a declaration on the part of the assured that the underwriters need not inquire into any matter relating to the vessel, nor believe anything heard in relation to it, as the whole truth had been told. But on the last trial the court held, that the assured were not bound to communicate things to the underwriters which they already knew, and that the jury were warranted in finding that they possessed this knowledge. If the intelligence is published in the papers before the company is formed, it should be communicated to the underwriters, because there is no presumption that they knew of it in such a case. *Himely v. South Carolina Ins. Co.*, 3 Const. R. 154.

Philadelphia might be unaffected by the fact that certain intelligence had been published in a Boston newspaper in time to have possibly reached him. But if insurance were made in Boston, and it were proved that the paper containing the intelligence was taken by the office, and was received there some hours before the policy was made, this, we should say, in the absence of rebutting testimony, would be conclusive. We give in our notes the cases which turn upon such questions.<sup>1</sup>

While it is certain that a person proposing a marine insurance is bound to communicate every material fact within his knowledge, and equally so, that, if a particular fact be known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that the fact was not communicated, a very recent English case has modified this last rule in an important way. It holds that if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the assured to show that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. We cannot but have some hesitation in accepting this doctrine. During the late war, in 1863-64, the Georgia screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, and this was also a subject of public notoriety, and, as such, known to the defendant, an underwriter at Lloyd's; at Liverpool she was bought by the plaintiff at public auction, and converted by him into a merchant vessel. In August, 1864, the plaintiff, through his broker in London, effected with the defendant an insurance of the vessel for six months. The particulars furnished by the plaintiff were: "Georgia steamship chartered on a voyage from Liverpool to Lisbon, and the Portuguese settlements on the west coast of Africa, and back." The vessel sailed from Liverpool, and was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, the

<sup>1</sup> *Green v. The Merchants' Ins. Co., Benson v. Commercial Ins. Co., Anthon*, 10 Pick. 492; p. 476, n. 1, *supra*; *Dick-* N. P. 92, p. 479, n. 1, *supra*.

defendant set up as a defence the concealment of the fact that the Georgia proposed for insurance was the late Confederate war steamer, and therefore liable to capture by the United States. The jury found that the defendant was not aware that the Georgia which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge, coupled with the particulars given by the plaintiff. Held, that the defendant was entitled to the verdict. It is obvious that this case raises, and perhaps turns upon, the question we have just considered, — what information the insurers are bound to possess. The facts may, perhaps, justify the verdict; but the principles of insurance law have not yet led to the conclusion, that if the insurer knew a fact and did not think of it while making the insurance, or did not think it material enough to take into consideration, the non-communication of the fact would discharge him. But the language used by the court in deciding this case would go almost, if not quite, as far as this.<sup>1</sup>

<sup>1</sup> *Bates v. Hewitt*, Eng. Law Rep. 2 Q. B., 595. Declaration on a policy of marine insurance, for six calendar months, on the screw steamer Georgia, subscribed by the defendant for 100%, claiming a total loss. Plea, that the defendant was induced to effect the insurance, and to subscribe the policy, by the wrongful and improper concealment, by the plaintiff and his agents, from the defendant, of certain material information then known to the plaintiff and his agents, and unknown to the defendant, and which ought to have been communicated to the defendant.

“The facts of the case are stated in the text. Mr. Justice *Shee* held: “The principle on which the law of concealment, as it relates to marine insurances, rests, is, that in bargaining for an insurance, the person proposing the insurance should take care that the underwriter is as well informed as he himself is of all those circumstances which would increase the risk which he offers to the underwriter. He is not bound

to communicate things which are well known to both. He is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter. But the person proposing the insurance is bound to communicate to the person whom he asks to undertake the insurance everything within his knowledge which is of a nature to increase the risk which the underwriter is asked to undertake.

“In this case there was a fact especially within the knowledge of the plaintiff, viz. that this vessel has been a Confederate cruiser. The plaintiff did not know that this fact was of a nature to increase the risk: it was, however, of a nature to increase the risk, because the vessel was, from having been a Confederate cruiser, liable to seizure by the government of the United States; this was a fact material to the risk, which the person proposing the insurance knew, and which the person to whom the insurance was proposed did not know. The parties, therefore, while they were con-



It may be added, that, if facts are known to an officer of an insurance company who has charge of its business, this will be held to be the knowledge of the company.<sup>1</sup> Nor can it be

sidering what one would be willing to give for the protection which he desired, and what the other would be willing to take for giving him that protection, were not upon equal terms; they had not an equal amount of knowledge; and the reason that they had not an equal amount of knowledge was, that the plaintiff kept back a material fact which he well knew.

"It was argued by the plaintiff's counsel, that it is enough if the person to whom the insurance was proposed had the means of knowing the material fact. No authority was cited for that proposition. No doubt there are cases in which it has been held, where the underwriter has the means, by merely looking at lists which are hung up in the room where the insurance is effected, of ascertaining a particular fact, it is not necessary that it should be communicated. In *Friere v. Woodhouse*, Holt, N. P. 572, it was ruled that information contained in Lloyd's lists need not be communicated to the underwriter, as by fair inquiry and due diligence in his business he could have ascertained the facts they contained. But the facts of the present case are very different. The underwriter had no means of presently knowing the fact not communicated to him; he might by possibility, if he had instituted inquiries, have found it out; but that he is not obliged to do. The person who proposed the insurance knew the fact, and it was a fact material to the estimate of the risk, and he ought to have communicated it. For these reasons, it appears to me that the plaintiff was guilty of concealment, and the verdict ought not to be disturbed."

Mr. Chief Justice *Cockburn*, in a concurrent opinion, said: "It is clear that there was an obligation on the part of the plaintiff to communicate this fact; it is clear that he did not communicate it; that he had disclosed partial information, which by possibility, if it had brought back to the defendant's mind what had previously been known to him, would have led him to the knowledge that this was the Confederate steamer *Georgia*; or if, on the other hand, he had the knowledge present in his mind, he might have read the particulars communicated to him in a different light from that in which he read them. It is laid down as a general proposition, that the party proposing the insurance, if he has omitted a material fact, can only enforce the insurance which, from the omission to communicate the fact, would otherwise be avoided, in the event of the jury finding by their verdict that by means of what he did communicate, coupled with any other fact that then might be present to the mind of the insurer, the latter knew at the time he granted the insurance the fact which it was the duty of the assured to communicate."

<sup>1</sup> It has been held that facts known to a director were not therefore known to the company. *Himely v. So. Car. Ins. Co.*, 3 Const. Rep. 154. It does not appear distinctly, in the report of this case, whether the facts came to the knowledge of the director at the time when he was a director or before. The company had been recently formed, and it is expressly stated that it did not exist at the time the intelligence was published in the newspapers. We may



necessary for the insured to communicate facts of general notoriety and common mercantile knowledge.<sup>1</sup> In all states there are general and established restrictions on commerce, imposed for revenue or protection. These may be presumed to be known to all merchants and insurers, so far as they affect voyages to those countries, and as equally known to insured and in-

therefore infer that the facts were not known to the director in his official capacity.

<sup>1</sup> In *Hohn v. Ins. Co. of North America*, 1 Wash. C. C. 158, Mr. Justice *Washington* held, that as to public transactions, foreign laws, or ordinances, the course of nature and trade, &c., by which the risk may be affected, the underwriter is always supposed to be equally well informed with the assured, provided they are notorious, and generally known. In *Calbreath v. Gracy*, Ib. 219, the same judge observed: "From the facts it appears that a vessel and cargo, ostensibly belonging to the subjects of one of two belligerent powers, navigating the sea in that character, and claimed as such before a Court of Admiralty, was warranted American property. It becomes the plaintiff, before he can expect to recover, satisfactorily to account for this conduct, seemingly so much at variance with the engagements he had entered into with the underwriters. He justifies it by contending that he has done nothing which was not warranted by the course of this particular trade. That the underwriters knew, or ought to have known, that no American vessel could carry on a trade from one Spanish colony to another, without assuming the character of a Spanish vessel, with a Spanish cargo. That, consequently, it was necessary to put on board a Spanish commander for form's sake at least, and to be fully documented as Spanish property. This excuse, if supported, in your

opinion [this is an extract from a charge to the jury] by the fact, would carry some weight with it; provided the ground of objection on the part of the defendant was concealment of the circumstances which were to change the character of the vessel and cargo. For, most certainly, it is the duty of the underwriters to know the course of the trade for which they engage to insure, and it will not afterwards lie in their mouths to object, that the assured had not disclosed what they knew or ought to have known." *Pollock v. Babcock*, 6 Mass. 234, in which *Parke, J.*, said: "It has frequently been determined, that in construing and applying a contract of insurance, the nature of the trade insured, and the circumstances under which it is to be carried on, must be taken into consideration. In this case the defendant, knowing that it was lawful to go to Rio Janeiro, but that it was unlawful to trade there, insures that the merchandise shall be safely transported there; and on its way it is taken, under a pretence, which is not proved, merely of an intention to trade. This certainly cannot excuse the underwriter." It was held in *Martin v. The Delaware Ins. Co.*, 2 Wash. C. C. 254, that the underwriters are bound to take notice of the course of trade; but it should appear that the course was so uniformly pursued as that it should have been known to the underwriters as well as to the insured. See also *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506.

surer. Many cases show that there is no obligation on the part of the insured to state facts like these. If, however, the prohibition or restriction be recent, or for any other reason does not come within this character of public notoriety, and the presumption thence arising, and the insured or his agent has, by any means, personal knowledge of it, the fact must be communicated.<sup>1</sup>

So, too, insurers are presumed to be acquainted with the usages of trade, and a conformity with these usages need not be declared to them. Thus, the carrying of fictitious clearances on a voyage in which they are customary need not be stated.<sup>2</sup> If these usages are so well established as to form, by a presumption of law, a part of the contract, they are still only an unexpressed or implied part. If the insured violates a usage by which he should be controlled, this act may defeat the policy. But if, when the policy is made, he intends to violate this usage, and makes this intention known to the insurers, and they thereupon make the policy, saying nothing therein of this intention, they will nevertheless be bound by the declaration of the insured, because the expression of his purpose will overcome the implication arising from the usage. And,

<sup>1</sup> *Hoyt v. Gilman*, 8 Mass. 336. In this case a recent decree of the French Emperor, affecting the risk, was not made known to the insurers by the insured, who had received information of it; and, a loss having occurred, a nonsuit was ordered in the action brought against the underwriters. In *Marshall on Ins.* 352, we find: "In the case of *Mayne v. Walter*, MS., 22 Geo. 3, it appears that, by a French ordinance, all ships were declared liable to capture, whereof the supercargo should be subject of a state at war with France; and it seems to have been the opinion of Lord *Mansfield*, that, though this ordinance was contrary to the law of nations, yet if a neutral insured knew of such an ordinance, and had not complied with it, he was bound to disclose this circumstance to the underwriters, and the withholding of it would have been a fatal concealment."

<sup>2</sup> *Planche v. Fletcher*, Dougl. 251. In this case goods were insured on board a ship from London to Nantz, with liberty to call at Ostend. She cleared only for Ostend, and sailed directly for Nantz, this being the known course of the trade, in order to avoid certain duties both in England and France. It was held that this was no fraud on the underwriters, so far as to vacate the policy. Lord *Mansfield* observed: "It is said there was a fraud on the underwriters in clearing out the ship for Ostend, when she was never intended to go thither. But I think there was no fraud on them, perhaps not on anybody. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to everybody."

if the intention affects the risks in any way, it is the business of the insured to provide for this by the terms of the policy. But whether the insured is bound to disclose such intentions may not be so certain. It has been held that, in regard to subjects which are expressly provided for, or spoken of in the policy, no representation would have any effect,<sup>1</sup> for if it differed from the policy it would be controlled by the policy. This is obviously true in regard to any express warranty of the policy. But, in a New York case,<sup>2</sup> the court say: "If it be conceded that those circum-

<sup>1</sup> In *Astor v. Union Ins. Co.*, 7 Cowan, 202, insurance was effected on a cargo of fur, owned and shipped by the plaintiff on board the brig *Twey Brudie*. The voyage was from New York to Hamburg. The policy contained the usual printed memorandum by which skins and hides and other articles perishable in their nature were warranted free of average unless general. The invoice proved was headed "Invoice of Furs." But in the body of the invoice they were described as bear, martin, &c., amounting in the whole to about \$24,000. The brig was wrecked on her voyage, but the cargo was saved and transported by land to Hamburg, and there found to be much damaged by sea-water, and was sold at auction for less than half the invoice prices. The plaintiffs abandoned for a total loss. The jury having found for the plaintiffs, on the motion for a new trial, the court held: "The defendants offered to prove that Roberts, who effected the policy as the agent of the plaintiffs, urged the taking of the risk at a low premium, on the ground that the articles would be free from particular average. This evidence was clearly inadmissible. In the first place, it was no more than the hearsay opinion of a third person. It was not a stipulation. It was not the representation of a fact. At most, it was the expression

of an opinion as to the meaning of the memorandum. It is certainly not within the power of an agent to fix by his opinion the meaning of a policy which he is authorized to effect. The plaintiffs, it is true, have adopted this act, but not such a legal construction of them as he may have given, though, at the time of executing his power, his opinion was not a part of the *res gestæ*. It was said a latent ambiguity, being created by parol evidence, may, in all cases, be removed by parol. Hearsay, however, is no evidence. If the defendants wished to avail themselves of Roberts's opinion, they should have put him on the stand. The judge being right in his legal decisions, and there not being sufficient evidence in favor of the defendants to warrant a setting aside of the verdict, a new trial is denied."

<sup>2</sup> In *DeWolf v. New York Firemen's Ins. Co.*, 20 Johns. 214, the property was warranted neutral. It was contended that a contract which might have affected its neutral character should have been disclosed, and *Spencer*, C. J., used the language quoted in the text. So the age of the vessel, and the place where she was built, need not be disclosed. *Poppleston v. Kitchen*, 3 Wash. C. C. 138. See also *Walden v. New York Firem. Ins. Co.*, 12 Johns. 128; *Dennis v. Ludlow*, 2 Caines, 111; *Haywood v. Rodgers*, 4 East, 590;

stances did enhance the risk, the answer is decisive, that a party need not communicate anything with respect to a fact in regard to which there is an express or an implied warranty." Here then implied warranties are put upon the precise footing of express warranties. A Massachusetts case carries this doctrine so far as to hold that the course of the voyage, and the ports at which the vessel might touch, must be determined by the description of the voyage in the policy, and therefore the withholding from the insurers of orders directing the voyage was not a material concealment.<sup>1</sup> The rule would, of course, apply to intentions of devia-

*Shoolbred v. Nutt*, Park, Ins. 300. So a stipulation in a charter-party that the vessel shall carry goods both on and under deck need not be disclosed to the underwriters of a general policy on the freight. *Adams v. Warren Ins. Co.*, 22 Pick. 163.

<sup>1</sup> *Houston v. New England Ins. Co.*, 5 Pick. 89. Assumpsit upon a policy of insurance on the ship *James* and cargo, at and from St. Johns, N. B., to Kingston and a market in Jamaica, and at and from thence back to St. Johns. The vessel sailed from St. Johns, bound for Port Maria, in Jamaica, there sold her cargo, took in another, and on her return voyage to St. Johns was totally wrecked. *Parker, C. J.*, held: "The first objection to the plaintiff's recovery which we have thought deserving of much consideration is the supposed variance between the voyage on which the vessel sailed and that for which she is insured in the policy. The voyage insured is [as above]. The vessel went directly from St. Johns to Port Maria, without going to Kingston; and it is insisted by the defendants that this voyage was not covered by the policy, because, according to the terms of it, she should have gone first to Kingston before she could have right to any other port in Jamaica. [The learned judge does not consider this position tenable, citing, in

support of his opinion, *Marsden v. Reid*, 3 East, 572; and *Kane v. Columbian Ins. Co.*, 2 Johns. 264; although allowing that the contrary is asserted in *Marine Ins. Co. of Alexandria v. Stras*, 1 Mumf. Va. 408; and continues.] Considering then that, by the terms of this policy, according to the legal construction of them, the insured had a right to send the vessel either to Kingston or to Port Maria, under the restriction, that, if she went to Port Maria, she could not go afterwards to Kingston, we are to determine whether the intention to go to Port Maria, and not to Kingston, existing before the policy was made, should have been declared to the insurers; in other words, whether the not declaring this intention, and the actual sailing of the vessel pursuant thereto, avoids the contract on the ground of concealment of a material fact known to the insured; and we are satisfied that neither upon principle or authority does this consequence follow. The legal construction of contracts of this nature is presumed to be known to the contracting parties; if it is not, they are still bound by it, and they cannot excuse themselves by an assertion of ignorance of the extent of their obligations. If the going to Kingston first was deemed essential by the insurer, he should have provided for it; if the knowledge that

tion, or of any acts which would produce unseaworthiness.<sup>1</sup> Would it then apply to a mere intention to disregard a usage?

she would not go there, except on a contingency, was important, he should have inquired, for he knew enough to put him on inquiry. There was no misrepresentation to lead him astray, for insurance to Kingston and a market is an insurance to any one port which has acquired the reputation of a market in Jamaica. And we think it would be highly prejudicial to trade, and to the honest speculations of merchants, to require of them to disclose the particular destination of their vessel, under a general insurance to several ports. He intends to go to a certain one, though it may be that on arriving there he will judge it convenient to go to some other. The underwriter knows he has a right to go to any one. Now we think he ought not to be held, unasked, to disclose the particular object of his expedition. It is enough that, if inquired of, he must either tell or apply somewhere else for insurance, if the underwriter applied to makes it an object to know." Judgment was accordingly given for the plaintiff.

<sup>1</sup> In *New York Firem. Ins. Co. v. Lawrence*, 14 Johns. 46, it was agreed by the whole court that an intention to deviate did not avoid the insurance. See also *Henshaw v. Mar. Ins. Co.*, 2 Caines, 274; *Houston v. N. E. Ins. Co.*, 5 Pick. 89, *supra*. The other rule laid down by *Kent, J.*, on the authority of *Middlewood v. Blakes*, that positive instructions given to the master to deviate or change the risk should be disclosed, does not seem to be settled. In *Middlewood v. Blakes*, 7 T. R. 162, the insurance was from England to Jamaica. The captain was instructed to stop at Cape Nicholas Mole. The vessel was

captured, while on her voyage, before her arrival at the latter place, and while on one of the three regular routes to Jamaica. But it appeared that, at a certain point in the course, it was usual for the captain to select one of the three routes, according to his discretion at that time. The instructions took away that discretion, and he took the route in which he was lost, for the sole purpose of touching at Nicholas Mole. It was held that the underwriters were discharged; and a majority of the court, including Lord *Kenyon, C. J.*, placed the decision on the ground that the instructions had not been disclosed; but *Lawrence, J.*, placed it on the ground that there had been an actual deviation. The decision has been supported on the ground taken by *Lawrence, J.*, in *Talcot v. Marine Ins. Co.*, 2 Johns. 130, and in *Marine Ins. Co. v. Tucker*, 3 Cranch, 357; and it was intimated that, had the loss occurred before the vessel arrived at the dividing line, the insurers would have been liable, thus approving the doctrine that the concealment of instructions to deviate or change the risk in any way would not avoid the policy. And this doctrine seems to be supported on principle. If we were to look merely to the question of materiality, we should say that both an intention to deviate and instructions to deviate should be disclosed, for it is obvious that either of them might influence the mind of the underwriter as to whether he would take the risk, or at what premium. But the further question arises, whether underwriters are not understood to waive representations of this kind. There seems to be no substantial difference between the con-

We should say that it would, provided the usage was so far established as to come within an implied warranty, and not otherwise.

Somewhat similar to this rule is that which holds the insurers bound to know the circumstances and conditions of any ports which require certain usages as to loading and unloading there.<sup>1</sup>

concealment of these facts and the concealment of information respecting seaworthiness. A deviation or any change of risk will discharge the underwriters as well as unseaworthiness, and there appears no reason why facts which affect the estimate of the probabilities of the one should be disclosed, while they are not required in the case of the other. In this view there appears to be no difference between a concealment of mere intention to deviate, and that of instructions to the captain to deviate, as either of them could only have the effect of increasing the probabilities of an event which would discharge the underwriters. This question is considered at much length in the able dissenting opinion of Chancellor *Kent* in *N. Y. Firemen's Ins. v. Lawrence*, *supra*.

<sup>1</sup> In *Kingston v. Knibbs*, 49 Geo. 3, cited *Vallance v. DeWar*, 1 Campb. 508, n., the action was on policy on ship, at and from Oporto to London. The ship, having taken in a part of her cargo inside the bar off Oporto, went outside to take in the remainder, when she was driven out to sea in a gale of wind and captured. The defence was, that the underwriters had not been informed she was to take in any part of the cargo outside the bar. But several witnesses stated that it was not unusual for vessels to do so at Oporto, when, from the state of the river, they cannot conveniently load entirely within the bar. And though it appeared that in policies, "at and from Oporto," liberty is sometimes expressly given to load on either side

the bar, Lord *Ellenborough* held, that the underwriters were bound of themselves to take notice of the usage, and the plaintiff had a verdict. *Ougier v. Jennings*, 1 Campb. 505, n. In *Vallance v. DeWar*, 1 Campb. 503, it appeared that, according to the usage of the Newfoundland trade, when ships arrive on the coast they are either employed for some time in fishing, or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, it was held by Lord *Ellenborough*, that in effecting a policy, "lost or not lost, at and from Newfoundland to a port in Europe," although the ship be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. In *Stewart v. Bell*, 5 B. & Ald. 238, insurance was from London to Jamaica generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to transship the cargo into shallops; but no information of this was given to the underwriters. Held, notwithstanding, that they were liable for a loss occurring after such transshipment. *Per Curiam*: "The assured must show that the port



And, therefore, no statement respecting them need be made by the insured.<sup>1</sup> It is said not to be necessary that the insured should give any information concerning events which had occurred previous to the date of his last intelligence, provided he communicates that intelligence truly.<sup>2</sup> Such is the rule to be derived from

to which the ship proceeds is the usual port for goods destined to the particular place. . . . The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly. The policy is to cover the goods till they are landed, and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured." And it was held in *Nelson v. The La. Ins. Co.*, 5 Martin, N. S. 289, that "the insured is not obliged to communicate a fact respecting the situation of the port of destination, the knowledge of which was equally within the reach of the insurer." See also *Bell v. The Marine Ins. Co.*, 8 Sergt. & R. 98.

<sup>1</sup> *De Longuemere v. The New York F. Ins. Co.*, 10 Johns. 120. In this case a vessel was insured from New York to the port of Sisal, in the province of Yucatan, with liberty to proceed to one other port in the province within certain geographical limits, and back to New York. After going to Sisal, the vessel proceeded to Silam, to take in cargo, and anchored about eight miles from the shore in the open sea, there being no harbor, and was driven on shore in a gale of wind. Sisal, Silam, and other places on that coast, though called ports, are merely open roads, there being no harbors there, and vessels lie at anchor several miles from the shore, and land and take in their cargoes by the aid of boats. It was held, that the word "port," used in the policy, must be taken in reference to the subject-matter; and though generally

meaning a harbor, yet when applied to Sisal and other trading-places on the coast of Yucatan, it meant only a road or anchorage place, for the purpose of loading and unloading cargoes; and that the insured were not bound to inform the insurers of these facts, as they must be presumed to know the nature and situation of the places to which the contract of insurance relates, — the topography of the places mentioned in the policy being matter of general knowledge with which every underwriter takes upon himself to be acquainted. Mr. Justice *Kent* remarked: "The plaintiff was not bound to communicate to the defendants his knowledge of Sisal and of other ports or landing places in Yucatan. These were matters of fact and of general notoriety, equally open to the knowledge of both parties, and which both must be equally presumed to know."

<sup>2</sup> *Freeland v. Glover*, 6 Esp. 14. Action of assumpsit on a policy of insurance on the ship *Neptune*, from Liverpool to the coast of Africa, and during her trading on the coast. The defence was concealment of circumstances. It appeared that the ship had sailed from Liverpool, arrived in safety on the coast, and while at Bembia, in December, 1799, the natives rose on them and killed the captain and wounded several of the crew. They had also been attacked by disease, so that, February, 1800, the crew, which had been twenty in number when they left England, were by death reduced to five. In February, the own-

the language of courts on this subject. Lord Ellenborough said: "You are not obliged to inform the underwriters of all by-gone calamities. If the underwriters were truly informed of all the circumstances known to the assured on his latest information, it is sufficient." If this language be construed with the facts of the case, it will lead to the conclusion that extremely adverse circumstances which have reduced the ship to a certain condition need not be disclosed, if that condition be truly stated. We should, however, have supposed in this very case that these adverse circumstances implied a continuing danger, and were therefore material, and should have been disclosed. In a New York case,<sup>1</sup> the insurance commencing on a certain day, the court say, "It cannot be material where the ship was prior to that day." It was not in that case, and would seldom be so; but we could not admit that such a fact could never be material, or that, if material, it need not be disclosed. We should prefer, therefore, to state the rule thus: Facts or events prior to the last intelligence would generally be immaterial, but if they were material they must be disclosed. The cases in our notes will show how this test of materiality has been applied.<sup>2</sup>

ers received a letter from the ship, stating the misfortune which had taken place, and the death of the crew. In the April following, another letter was written, stating the condition of the ship, and that they had been able to get nine men, which was the whole of the ship's crew. This letter was received in September, and the policy in question effected on it. But, on effecting the policy, the broker had shown the letter of April, and not that of the February preceding. Lord *Ellenborough* held, as stated in the text. In *Byrnes v. Alexander*, 1 Brev. S. C. 213, a verdict was rendered for the plaintiff, but was ordered to be set aside for reasons which appear in the extract from the opinion of the court. "In the present case it can hardly be doubted that Dennis did know of the loss in time to have written to forbid his orders to in-

sure before the policy was effected. But, however that might be, it is beyond all sort of doubt that notice was given or left at his house in time, if he had been at home, to have afforded him an opportunity to have done so, and this was sufficient. If he had been in the way, it would have been sufficient; but his being out of the way, and the notice having been given at the usual and proper place where his business was done, makes the case equal. That he had not seasonable notice was owing to his own wilful fault or negligence, of which he cannot avail himself."

<sup>1</sup> *Kemble v. Bowne*, 1 Caines, 75.

<sup>2</sup> *Ely v. Hallett*, 2 Caines, 57. Opinion by Mr. Justice *Thompson*: "The underwriter on a policy of insurance enters into the contract, and computes the premium, in full confidence that the insured, being fully informed of all cir-

Very few facts are necessarily and always material, nor are there many which circumstances might not make material. If

circumstances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know. Every fact and circumstance, therefore, which can possibly influence the mind of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and a concealment thereof will vitiate the policy." Judgment for the defendants. In this case the plaintiff knew that a violent storm took place at the port from which the vessel sailed, about eleven hours after she sailed. When he applied for the policy, he informed the defendants that there had been blowing weather and severe storms on the coast after the vessel had sailed, but made no statement whatever in reference to the particular storm above mentioned. From the elaborate note attached by the learned reporter to this case we compile the following: It has been decided that a policy was vacated where the assured had heard that a vessel like his was taken, and did not disclose it. *Da Costa v. Scandret*, 2 P. Williams, 170. In *Stewart v. Dunlop*, Park, 276, the same result ensued, where the clerk of the assured knew of the loss of the vessel upon the day on which he wrote for insurance; and where the agent of the assured knew of a paper stuck up at Lloyd's stating that the vessel underwritten had been seen at a certain place "deep and leaky," and did not disclose it, the policy was held to be void. *Lynch v. Durnsford*, 14 East, 494. It was held, in *Hodgson v. Richardson*, 1 Black. 463, that where a vessel has sailed from her port of loading, and is insured at an in-

termediate port, "at and from," to that of her destination, "the adventure to begin from the loading," concealing that the port "at and from" whence underwritten is not the port of loading, but an intermediate port, is fatal.

Where the voyage may be completed between the time at which a vessel is expected to sail and the day of effecting the policy, or where the relative proportion between such interval and the length of the voyage is important, not mentioning the day of sailing or expected sailing is a concealment; for wherever a vessel may, from such a lapse of time, be supposed a missing ship, the day of sailing or expected sailing must be disclosed. *Webster v. Forster*, 1 Esp. 407; *Willes v. Glover*, 1 N. R. 14. When the voyage is from a belligerent colony to a neutral port, and thence to the mother country of the colony, that the cargo had not been landed in the neutral territory must be communicated; *Kohne v. Ins. Co. of N. A.*, 6 Binney, 219, 1 Wash. C. C. 93; but when the voyage is from a belligerent country to a neutral port, an ulterior destination to a belligerent colony need not, for it does not increase the risk of the particular voyage. *Steinbach v. Columbian Ins. Co.*, 2 Caines, 129. Whatever does augment it must be told. Therefore, that the insured, though a neutral citizen, carries on trade in a belligerent kingdom, must be mentioned on effecting a policy even in his own country. *Arnold v. United Ins. Co.*, Lex Mer. Amer. 307; *Juhel v. Rhineland*, 2 Johns. Ca. 120; *Bodny v. Union Ins. Co.*, 1 Cond. Mar. 473. So must a letter of instructions, containing matter which would expose the property to danger

they are material, then the rule requiring disclosure applies to them. And the requirement of full disclosure has been carried very far. Perhaps the case of *Ely v. Hallett*, is an illustration of this, and possibly of carrying this requirement too far. In this case, the concealment related to a storm; but in a Massachusetts case,<sup>1</sup> the withholding of information respecting a storm was held

under principles of decision of a belligerent court of vice-admiralty, whether those decisions be warranted by the law of nations or not, *Sperry v. Del. Ins. Co.*, 2 Wash. C. C. 243, or what, according to established adjudications of belligerent courts of vice-admiralty, will be a ground of condemnation. *Marsh v. Union Ins. Co.*, 1 Cond. Marsh. 473, n. But that a circumstance made material by an arbitrary ordinance of a foreign power, of which both parties were ignorant, and of which neither was obliged to inform himself, was not communicated, does not affect the policy. *Mayne v. Walter*, Park on Ins. 263, Dougl. 79. Nor on a policy to an open port on lawful goods, effected by a neutral in his own country, that they were contraband of war. *Seton v. Low*, Lex. Mer. Amer. 303. The reason given for this decision is, that to a neutral all goods are lawful; it might also be considered (which perhaps would be the better ground of determination) the duty of the underwriter to inform himself of their nature, for of such things there need not be any disclosure. Therefore whether a ship be home or foreign built is a subject of inquiry for the insurers; *Long v. Duff*, *Same v. Bolton*, 2 B. & P. 209. So is her national character; *Etting v. Seaman*, 2 Johns. 157; and the time of emigration of a naturalized citizen, he not being bound to disclose it, though he emigrate *flagrante bello*. *Dugnet v. Rhinelander*, 2 Johns. Ca. 476. A further rule as to concealment and disclosure is, that what is im-

pliedly warranted against need not be mentioned, though if known it would enhance the risk and increase the premium; because it is a peril at the door of the underwriter. *Haywood v. Rogers*, 4 East, 450. Therefore, on a policy at and from a port of original departure, it is not necessary to state how long the vessel has been there; *Kemble v. Bowne*, 1 Caines, 75; nor the necessity of repairs from injuries in a voyage preceding that insured. *Beckwith v. Sidebotham*, 1 Campb. 116; *Shoolbred v. Nutt*, Park, 300.

<sup>1</sup> In *Fiske v. The New England Mar. Ins. Co.*, 15 Pick. 310, a vessel was insured by the defendants in March, 1832, "at and from Boston to Smyrna, and at and from thence back to Boston." It appeared that she sailed from Boston on the 19th of November, 1831, and was never heard of afterwards, but that she was not out of time when the insurance was effected; that there was a severe storm in Boston on November 22, 1831, and that one underwriter had refused to insure her on being informed that she sailed before that day. Several underwriters testified that ordinarily they should make no difference in the premium, on account of the vessel's having sailed before the insurance was effected, but that in the season of 1831-32, which was unusually severe and destructive, it would have made a difference in their opinions; but it was proved that insurance was effected on the profits of a portion of the cargo of the same vessel on

not to be a material concealment, although in our judgment the concealment in this case was quite as material as in the New York case.

February 23, 1832, at the same rate of premium, and that the underwriter knew that she had been gone a long time. It was held, that the time of the vessel's sailing was not a fact material to the risk under these circumstances, and that, therefore, if it were not communicated to the defendants, this would not avoid the policy; but that, if it had been a material fact, the burden of proof would have been on the defendants to show that it had not been communicated. Mr. Justice *Putnam* remarked: "In the case of *Ely v. Hallett*, 2 Caines, 57, the plaintiff had special information of a violent storm which took place eleven hours after the vessel sailed, which he did not particularly describe to the underwriters, and it was held by a majority of the court that he could not recover. But here the vessel sailed three or four days before the storm was observed in Boston. If the ship proceeded on her voyage with usual despatch, she might, on November 22, 1831, have been in pleasant weather two or three hundred miles distant from Boston, where the storm then raged. It would have been a somewhat violent presumption, to assume as a fact that the ship encountered that storm. We think, in the absence of any other proof upon that point, that this evidence is not sufficient to establish the fact that there was anything extraordinary which was connected with the time of sailing, which rendered it material to the risk." But see *Russell v. Thornton*, 4 Hurlst. & W., Exch. 788, 6 Ib. 140, in which the plaintiff, who was agent in London of some foreign owners of the steamship "B," being instructed to cause the ship to be insured by a time policy for a

year, from the 21st of January, 1857, employed H. & Co., insurance brokers, to effect the insurance. On the 15th of January, H. & Co. applied to the defendant to become an insurer. On that day the plaintiff received a letter from the captain of the ship, informing him that the vessel had been aground, and had received some very heavy blows, and had made her way, in a sinking state, to the port of Carthagena, where she then was. On the same day the plaintiff communicated this letter to H. & Co., but H. & Co. did not communicate it to the defendant. On the 16th the defendant agreed to become insurer for £ 3,000, and debited H. & Co. for the premium. On the 22d, the plaintiff, finding that no notice of the accident had reached London, sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been on shore, wrote to H. & Co. as follows: "Understanding that the ship 'B' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." This letter was not answered by H. & Co. The debit of H. & Co. on the books of the defendant remained until after the loss. The ship was surveyed and repaired, and reported to be perfectly tight, and in a condition to undertake a voyage of any description, on the 23d of April. After several intermediate voyages, she was totally lost on the 9th of October, 1857. Held, that the concealment of the information received from the captain, that the ship had been on shore, was a concealment of a material fact which vitiated the policy.

While all material intelligence, and even rumors and reports, must be communicated, the line must be drawn somewhere between these and mere conjectures, suspicions, or possibilities. Outside of such facts as any reasonable insurer would take into consideration, lies a large class of those which some might deem material, and others not. There may be those which would very generally be disregarded, but which a timid or fanciful insurer would think worth notice. In some cases this line of distinction is drawn.<sup>1</sup> In such cases the test of materiality, which is the

<sup>1</sup> As in *De Costa v. Scandrett*, 2 P. Williams, 170, in which one having a doubtful account of his ship that was at sea, viz. that one described like her was taken by the enemy, insured her, without giving any information to the insurers of what he had heard, either as to the hazard or circumstances which might induce him to believe that his ship was in great danger if not actually lost. The Lord Chancellor *Macclesfield* held: "The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him at least to fear that it was lost, though he had no certain account of it; for if this had been discovered, it is impossible to think that the insurers would have insured the ship at so small a premium as they have done, but either would not have insured at all, or would have insisted on a larger premium, so that the concealing of this intelligence is a fraud." Where A, abroad, having two warehouses, wrote to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire that evening, and that there was danger of the fire again breaking out, and sent his letter after the regular post-time, and the fire, hav-

ing broken out on the next day but one following, consumed A's warehouse, it was held to be a material concealment, though A's letter was written without any fraudulent intention. *Buff v. Turner*, 2 Marsh. Rep. 46; *Seaman v. Fonnereau*, 2 Str. 1183; *Durell v. Bederly*, 1 Holt, 283. In *Ruggles v. Gen. Int. Ins. Co.*, 4 Mason, 74, the insured's offer of higher premiums had been refused by other companies. *Story, J.*, said: "But he was not bound to communicate his other offers, or his fears or hopes, but only to communicate any facts which justified them, and the material fact as to time was stated." In *Marsh v. Muir*, 1 Brev. 133, it was held, that the insured is not bound to anticipate a capture and condemnation, in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general an impression of danger as must enhance the premium of insurance. But a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become grounds of condemnation in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.



question whether the insurer under that policy would have regarded those facts in making the policy, should perhaps in justice to both parties have been modified into this form, — Would a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks, have regarded these facts as bearing on these risks? Hence, it has been said that the insured need not disclose that other underwriters have refused the risk, or their reasons for declining it, for each insurer must make up his own mind on the bargain proposed.<sup>1</sup> We have already seen that if the insured falsely states that other insurers have insured the risk for a certain premium, this is a fatal misrepresentation. But it has been held, that, if he only expresses his own opinion as to the premium they would require, this is immaterial, although he knows that they would not insure for that premium. We cannot but think this open to some doubt; and the principal case<sup>2</sup> rests

<sup>1</sup> *Ruggles v. Gen. Int. Ins. Co.*, 4 Mason 74, p. 494, n. 1, *supra*.

<sup>2</sup> *Clason v. Smith*, 3 Wash. C. C. 156, opinion by Mr. Justice Washington: "The misrepresentation asserted to have been made is contained in a letter from the plaintiffs to their agents in Philadelphia, of the 23d January, in which they agree to give fifteen per cent premium, and add: 'We have no doubt but that we could get the insurance effected in New York at that premium.' The defendant refused to take the risk for less than twenty per cent premium. The evidence proves that applications were made to different offices, the whole of whom refused to take the risk at all. In point of fact, then, this statement in the plaintiffs' letter of the 23d of January was not true, and in this respect the statement cannot be defended at the bar of conscience. But the question to be decided by the court and jury is, How stands the law in relation to this representation? If a misrepresentation, in point of fact, had no influence, nor ought to have had any, it is impossible to say that it was material.

Now it is clear, in this case, that the misrepresentation had no influence in affecting the rate of premium, because the underwriters proceeded upon their own judgment, and demanded twenty instead of fifteen per cent as the rate of premium; nor ought it to induce them to take the risk at all, or in any respect to influence the rate of premium. The letter asserts nothing, but merely expresses an opinion that insurance could be effected in New York at fifteen per cent. The very terms used imply that the opinion was not formed on anything certainly ascertained as to the fact, because, if that had been the case, it would have ceased to be a doubt. The mere expression of an opinion, or an expectation, as to a matter which might even imply that the party had some ground deemed by himself sufficient on which to build his opinion, would not amount to a misrepresentation sufficiently material to avoid the policy, because it is the folly of the other party not to inquire into the grounds of the opinion. But when the opinion is such as cannot possibly be well founded, and bears on

the decision as much upon the fact that the insurers knew the falsity, and could not have been deceived by it. It must be quite certain that there need be no disclosure of facts bearing directly and materially upon risks which the property insured will undergo, provided they have no bearing whatever on the risks which the insurers are to assume. There are some things which the policy usually provides for expressly; but if it does not, and the insured has any knowledge about these things which the insurer has not, this must be communicated. As instances of this we may mention the national character of the ship, and all belligerent risks, and those springing from contraband or blockade, or peculiar adjudications of belligerent courts leading to condemnation.<sup>1</sup> All

the face of it the full evidence that it is unauthorized, it becomes obviously harmless, so far as the insured is concerned, and the conclusion becomes irresistible that he was not misled, or, if he was, that he has only himself to blame for it. Such is the present case. The plaintiffs say they do not doubt that they could have the insurance effected in New York at fifteen per cent. The insurer cannot possibly believe this to be a candid opinion, because, if it was, why should the plaintiffs come to Philadelphia, and at once offer to give the same premium here, and finally consent to give twenty per cent? If, indeed, the plaintiffs, by this uncandid statement, had endeavored to get the insurance effected at fifteen per cent, and had succeeded, the defendant might have been deceived by the misrepresentation, inasmuch as it would have assigned at least a plausible reason for applying to the underwriters in Philadelphia. But, even in that case, the statement would not have amounted to more than an opinion. If a man, in order to enhance the value of his property, asserts his belief that he could get for it, from those who know its value, a certain sum, and offers it for the same price, or even for more, and in truth he

knew that he had no just ground for the opinion he had expressed, but the contrary, we do not think that a court of law or equity would, on that account, set aside the contract of sale, for it was the folly of the purchaser to govern himself by a mere opinion, without examining into the facts upon which the opinion is founded. Nothing can be more clear than that, in this case, the misrepresentation was not material."

<sup>1</sup> In *Banday v. The Union Ins. Co.*, 2 Wash. C. C. 391, an insurance was made by R., a citizen of the United States, and a resident merchant of Philadelphia, on specie from Cape François to Philadelphia, with a warranty of neutrality. Upon the happening of a loss, R. received from the defendants nineteen hundred and ninety-seven dollars, the amount of the specie shipped; but finding that of this sum only eleven hundred and fifty-two dollars was his property, he returned the balance to the defendants, against whom afterwards the plaintiffs, resident merchants at Cape François, brought this suit for the money so returned by R. It was held that "the plaintiffs, being persons established and carrying on trade in a belligerent country, cannot recover against the defendants, even if the insurance

such circumstances, if known to the assured, should be disclosed; and none the less so if these adjudications are opposed to the

had been made for their account, as there was no disclosure of their belligerent character at the time of the insurance, which was so obviously material as to avoid the policy." *Marshall v. Union Ins. Co.*, 2 Wash. C. C. 357. But if the circumstances are such that the insurer should know the danger of belligerent goods being shipped, and makes no inquiry in regard to them, the character of the goods need not be disclosed. *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151. See *Barker v. Blakes*, 9 East, 283; *Stocker v. Merrimack M. & F. Ins. Co.*, 6 Mass. 220, 226; *Hodgson v. Marine Ins. Co.*, 5 Cranch, 100. As a general policy covers war risks, a false clearance is immaterial and need not be stated. *Barnewall v. Church*, 1 Caines, 217. In *Bowne v. Shaw*, 1 Caines, 489, there was a warranty against loss "by capture or detention for or on account of any illicit trade, or trade in articles contraband of war." The goods covered by the policy on which this suit was brought were lawful and insured at a premium of nine per cent. Certain contraband articles were shipped by the plaintiffs, as agents, and insured at a premium of thirty per cent. The defendants were aware of this, and were therefore held liable. In *Kohne v. Ins. Co. of N. A.*, 1 Wash. C. C. 93, 6 Binn. 219, insurance was effected on a cargo of goods from Newport, Rhode Island, to Port Passage, in Spain. The vessel had brought the goods from Lagaira, trade being then prohibited between that place and Spain. The court held that the fact of the goods having been so brought should have been communicated. If the instruc-

tions to the master violate any of the rules established by the Court of Admiralty in England, the instructions should be communicated, although such rules are against the law of nations. *Sperry v. Delaware Ins. Co.*, 2 Wash. C. C. 243. But see *Marsh v. Muir*, 1 Brev. 133, cited *ante*, p. 494, n. 1. It has been held that an assured is not bound to communicate that he emigrated from France to this country at a time when there was a war between France and England. *Duguet v. Rhinelander*, 1 Caines, Ca. 25, 2 Johns. Ca. 476, reversing the same case in the Supreme Court, 1 Johns. Ca. 360. But see *Campbell v. Innes*, 4 B. & Ald. 423, *infra*. In *Coulon v. Bowne*, 1 Caines, 288, a question arose as to the construction of the following representation: "Mr. Coulon is a naturalized citizen of the United States since the year 1794." This was held to mean that he was naturalized after the year 1794. In *Campbell v. Innes*, 4 B. & Ald. 423, the vessel, insured in England, sailed on her voyage to Virginia after the United States had declared war, but before it was known in England. The concealment of the fact that the vessel was American property was held to avoid the policy. *Bayley, J.*, said: "In this case it does not appear that the underwriter knew the ship and goods to be American property. Now that makes a material difference in the risk; for if the property be British owned, of course the owner will do all in his power to prevent the risk from occurring; but if it be American owned, he may, if he be secure of payment by the underwriter, lend himself to the purposes of his own government, and assist them in obtaining possession of the

law of nations.<sup>1</sup> The time of sailing,<sup>2</sup> and the rate of sailing,<sup>3</sup> as whether a ship be fast or slow, may be very immaterial, or they

property insured. See *Francis v. Ocean Ins. Co.*, 6 Cowan, 404; *Odlin v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. 312, 320; *Price v. Du Peau*, 1 Brev. 452; *Murray v. United Ins. Co.*, 2 Johns. Ca. 168.

<sup>1</sup> *Marshall v. The Union Ins. Co.*, 2 Wash. C. C. 357. The vessel insured was captured on her voyage to Carthage, and condemned on the ground of illicit trade, a part of the cargo having been brought from Spain to New York by a Spaniard, entered for exportation, and afterwards sold to the plaintiff, the Spaniard going out as passenger on board the vessel, and the transaction was considered by the British Court of Admiralty as illegal, they deeming it a trading between the mother country and her colony. It was held, that if the jury considered that the assured was guilty of concealment of the shipment of the goods of Spanish origin, then the

policies effected by the plaintiff would be void, for the taint of a part of the cargo would occasion a seizure, detention, and expense, and give the assured a right to abandon. The assured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and courts, and to communicate the circumstances; although, if against right the belligerent courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk. Mr. Justice *Washington* observed: "The jury must inquire for themselves whether the circumstances were natural to the risk; and in making this inquiry, they should carry back their minds to the time when the insurance was effected, without attending to the subsequent capture and condemnation.

<sup>2</sup> The law as to the time of sailing is thus stated by Mr. Justice *Story* in *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 188: "That the time of sailing is often very material to the risk, cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation, and touching and staying at port, the objects of the enterprise, and other circumstances, political

and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience; and are to be ascertained in part upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters and others who are conversant with the subject of insurance." The learned judge then goes

<sup>3</sup> *Ruggles v. Gen. Int. Ins. Co.*, 4 Mason, 74, 82; *Littledale v. Dixon*, 4 B. & P. 151.

may be extremely material; and many cases, as our notes will show, have been decided on this question.

Would the circumstances of this case, which were disclosed, have appeared material, in October, 1806, to any of these parties? The insured knew, provided his purchase was *bona fide*, that the goods became thereby neutral, and were not liable to condemnation. He also knew, that, in general, it was not necessary for the insured to disclose from whom he had purchased the cargo which he asks to be insured; and he also knew that, according to the law of nations, it was no cause of condemnation that the vendor was an enemy, and was to be a passenger in the vessel carrying the goods. It might or might not have occurred to him that these were circumstances which, with a suspicious court or rapacious captors, might lead to difficulty; but we do not know that

on to say that the same rule governs in a case of sailing from a home port as in a case from a foreign port. In *Ratcliffe v. Shoolbred*, Park, Ins. 181, Marshall, Ins. 349, it was stated that the ship "was on the coast the 2d of October"; but the fact that she sailed on that day was not communicated. Lord *Mansfield* told the jury, that "the insured were bound to represent to the underwriter all the material circumstances relative to the ship and the voyage; that the plaintiffs in this case, having concealed a material part of the information they received, it was a fraud, and the insurers were not liable." *Fillis v. Brutton*, Park, Ins. 414, Marshall, Ins. 348. It was held in *Mackay v. Rhineland*, 1 Johns. Ca. 408, that "if a vessel be represented as out 'about nine weeks,' when in fact she has been out ten weeks and four days, it is not a material misrepresentation,

the insured is bound to anticipate every possible ground of suspicion which might weigh with some minds and totally escape the observation of others. If, according to any established adjudications of the belligerent courts generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed. So a case may happen where the circumstances are of such a nature as to make the danger of capture very great, in which the court mean not to say that a disclosure ought not to be made. But it is not every conjecture or opinion as to the materiality of the circumstances concealed which ought to weigh with a jury."

provided the latter period be within the usual time of the voyage." In *Williams v. Delafield*, 2 Caines, 329, the court observed: "The fact of misrepresentation is alleged to consist in the plaintiff's stating, as an independent and substantive fact, that the *Margaret* had been out but twenty-six days, when in truth she had been out twenty-seven. The court do not mean to decide that a misrepresentation of one day may not be material, and avoid the policy. They forbear expressing, in this case, an opinion on that point; but they are clearly of opinion, that when the plaintiff represented, 'I have information of her sailing, and she has been out, this day, twenty-six days,' in good sense and strict construction the information was applicable as well to the sailing as the time she had been out." In *Rice v. The New England Mar. Ins. Co.*, 4 Pick. 439, in effecting insurance on property

on board a certain brig from Kingston to St. Andrews, the assured communicates truly to the underwriter that he is informed, by the master of a vessel which left Kingston on the 20th of August, that the brig was to sail four days after, which would make her within time, but she had in fact sailed on the 12th, so that she was out of time. Held, not to be a misrepresentation, on the ground of expectation. See cases cited *ante*, p. 421, n. 1, *Ruggles v. Gen. Int. Ins. Co.*, 4 Mason, 74; *Fort v. Lee*, 3 Taunt. 381, is a strong case, as follows: A policy was effected in London the 24th of May, 1808, upon a ship on a voyage at and from London to her port of discharge, lost or not lost. The date of the ship's sailing was not disclosed to the underwriters; and a broker who was called said, that if he had known of the ship's sailing he should have thought it a circumstance material to be communicated, although he admitted that if, at the time of effecting the policy, she had sailed only a week, he should have thought it immaterial. A verdict having been obtained for the plaintiff, motion was made to set it aside, upon the ground that the time of the ship's sailing was a material circumstance, and, although known, it had not been communicated to the underwriter. "But the court said, that, if the underwriter had wanted to know whether the ship had sailed, he ought to have inquired, and unanimously refused the rule." It was held in *Fiske v. New England Mar. Ins. Co.*, 15 Pick. 310, that "the time of sailing of a vessel insured is not, in itself, a fact material to the risk; but where there has been a severe storm immediately after the sailing of the vessel, which was known to the insured, but not known to the insurer, or where she is a missing ship, in such cases the time of her sailing becomes material, and, if it

be not communicated to the insurer, the policy is void." In *Elton v. Larkins*, 5 Car. & P. 385, 8 Bing. 198, *Tindal*, C. J., held: "The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless, at the time of effecting the policy, the ship is what is called a missing ship." In *Elkin v. Janson*, 13 M. & W. 655, the underwriter pleaded that, at the time of making the policy, the plaintiff wrongfully and improperly concealed from the defendant certain facts and information, setting them forth, which were material, as showing that the vessel was out of time. To which the plaintiff replied *de injuria*, on which issue was joined. On the trial the jury found that the facts were material, but stated that there was no evidence before them on which they could decide whether or not they were communicated to the defendant. The court held that the burden of proof, in the first instance, lay on the defendant to give some evidence of the non-communication, and generally the mere fact of subscribing the policy would be sufficient, and that then the burden would be cast on the other side. In *Westbury v. Aberdeen*, 2 M. & W. 267, it was held, that, where two vessels sailed from a port at about the same time, and one arrived five days before the policy on the other was effected, it was a question for the jury to decide whether the non-communication of such intelligence materially affected the risk.

In *Chaurand v. Angerstein*, Peake's N. P. 43, a verdict was found for the defendants, on the ground of misrepresentation as to the time of sailing, evidence of brokers being admitted to show that it was material. It was clearly held in *Curell v. Miss. Mar. & Fire Ins. Co.*, 9 La. 163, that "an error in stating the time when a vessel sailed, so as to place her out of time when the in-



insurance is effected, will be considered a misrepresentation and concealment of the true time, whether through error or intention, sufficient to avoid the policy and release the insurers. A knowledge of the true date at which a ship sails is all-important to the insurers, who are about to take upon themselves the risk of her safe arrival at the port of destination." *Bridges v. Hunter*, 1 M. & S. 15. In *McAndrew v. Beel*, 1 Esp. 373, the facts in evidence were, that the plaintiff, on the 24th of November, received a letter from Lisbon, dated the 8th of the same month, informing him that the ship was then ready to sail. He did not make the insurance on the receipt of the letter, but waited till the 2d of December, when he effected it, and at the time did not communicate the contents of the letter to the underwriters. "Lord *Kenyon* said, that he was of opinion that there was a concealment of circumstances sufficient to avoid the policy; that it was clear that the underwriter ought to be acquainted with every circumstance respecting the ship's time of sailing, and her probable arrival, inasmuch as the premium sustained so consid-

erable an advance where the ship was deemed a missing ship." And in *Webster v. Foster*, Ib. 407, the same learned judge observed, that "there was another circumstance which appeared to him to be decisive against the policy, which was, that, though the vessel had sailed near six weeks before the plaintiffs gave instructions for the policy, they had not communicated this circumstance to the broker, but had been completely silent on the subject; that was an attempt at evasion, and a concealment of circumstances sufficient to avoid the policy." *Kirby v. Smith*, 1 B. & Ald. 672; *Anderson v. Thornton*, 8 Exch. 425, 20 Eng. L. & Eq. 339; *Baxter v. N. E. Ins. Co.*, 3 Mason, 96; *Livingston v. Delafield*, 3 Caines, 49. In *Johnson v. Phoenix Ins. Co.*, 1 Wash. C. C. 378, Mr. *J. Washington* held, that "it may be a material concealment from the underwriters, if a letter communicating the period when the voyage insured commenced was not exhibited at the time the contract of assurance was entered into. This would certainly be so, if the vessel was out of time when the insurance was ordered."

## CHAPTER XV

## OF THE PREMIUM.

SECTION I. — *What the Premium is, and who is liable therefor.*

THE promise of the insurers to indemnify the insured requires, like all other contracts, a valid consideration ; and this consideration is the amount paid for the insurance by the party insured, which is called the premium.<sup>1</sup> This is usually regarded as due on the delivery of the policy ; but in marine insurance, which is now effected in this country almost exclusively by incorporated companies, the premium is usually paid by a promissory note, given when the policy is delivered, or soon after, and called the premium note.

Our policies usually acknowledge the receipt of the premium ; but this can be no bar to a suit for it if it has not been paid. The general rule of law is, that a receipt for money is open to evidence, either to qualify it or to controvert it altogether. It is true that generally no written contract is to be varied by oral evidence. But even in a deed for land, where the receipt of the consideration money is acknowledged under seal, the actual payment may be inquired into and any question raised concerning it which does not tend to impeach or invalidate the deed, or vary any of its provisions ;<sup>2</sup> and the same rule must certainly be applicable to policies of insurance. But where the validity of the contract depends upon the receipt of the premium, parol evidence has been held not admissible to contradict the written acknowledgment in the policy.<sup>3</sup> But in a recent case in New York it was held, that, although the printed terms of the policy state that no policy will be considered binding until the premium is paid, this condition may be waived, and if it is to be inferred from the facts in the case,

<sup>1</sup> "The word 'premium,' says Emerigon, "comes either from the word *præmium*, signifying price, or from the word *primo*, because formerly the premium was paid before all, and at the time of

signing the policy." Emerigon, ch. 3, s. 1 (Meredith's ed.), p. 51.

<sup>2</sup> 1 Greenl. Ev. 26, note.

<sup>3</sup> Goit v. National Protection Ins. Co., 25 Barb. 189.

that a credit is intended, the policy will be valid although the premium is not paid. This ruling was made in an action on a fire policy; but it rests on reasons equally applicable to marine insurance.<sup>1</sup>

In England contracts of insurance are made, generally, if not always, by brokers, who make themselves liable to the insurers for the premium, and stand, generally, as regards the underwriters, in the same position as the insured do in this country.<sup>2</sup> And they are allowed to recover the amount from the insured as *money paid*, before they have actually paid it to the underwriters.<sup>3</sup>

The actual owner of the property or interest which is insured, being in fact the party for whose benefit the contract is made, is bound to pay the premium;<sup>4</sup> and this even if the note of another

<sup>1</sup> *Boehen v. Williamsburg Ins. Co.*, 35 New York, 131.

<sup>2</sup> For cases growing out of the peculiar relations of underwriters and brokers in England, see *Airy v. Bland*, Park, Ins. 34; *Edgar v. Bumstead*, 1 Campb. 411; *Edgar v. Fowler*, 3 East, 222; *Grove v. Dubois*, 1 T. R. 112; *Bize v. Dickason*, 1 T. R. 285; *Minett v. Forrester*, 4 Taunt. 541; *Cumming v. Forrester*, 1 M. & S. 494; *Koster v. Eason*, 2 M. & S. 112; *Parker v. Beasley*, 2 M. & S. 423; *Houstoun v. Robertson*, 6 Taunt. 448.

<sup>3</sup> See *Power v. Butcher*, 10 B. & C. 329, cited *post*, next note. This is allowed on the ground that there are running accounts between the brokers and underwriters, on which the former are credited with the losses, and the latter with the premiums. The consequence of this practice is, that in ordinary cases, as against the assured, the underwriter cannot set up that the broker has not paid the premium of which he has acknowledged the receipt. *Dalzell v. Mair*, 1 Campb. 532; *De Gaminde v. Pigou*, 4 Taunt. 246; *Anderson v. Thornton*, 8 Exch. 425, 20 Eng. L. &

Eq. 339. But if the assured has fraudulently induced the underwriter to give credit to the broker, the receipt will not estop the underwriter from claiming the premium of the assured. *Foy v. Bell*, 3 Taunt. 493. And so, where there is fraud on the part of the broker and the assured. *Mavor v. Simeon*, 3 Taunt. 497, note.

But it seems always to have been admitted in England that the policy would not be conclusive evidence of the payment of premium between the underwriter and broker. See the argument of Best, Sergt., in *Foy v. Bell*; *Cumming v. Forrester*, 1 M. & S. 494. And it cannot be doubted that in the United States, when the underwriter looks in the first instance to the assured for the premium, the policy would not be conclusive evidence of its payment. *Ins. Co. of Penn. v. Smith*, 3 Whart. 520.

<sup>4</sup> The practice in England in effecting insurances and paying premiums is thus described by *Bayley, J.*, in *Power v. Butcher*, 10 B. & C. 329, 340: "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in

is taken who is agent or broker for the principal,<sup>1</sup> unless the insurers knew that the agent was not acting for himself. In that case they are to be considered as electing to take the liability of the agent or broker, and can look no further.<sup>2</sup> But they do not elect to take the agent, when they do not know that he is not the principal, or that there is another principal to whom they might look.<sup>3</sup> If, however, the agent or broker signs the note in his own name, the principal is never liable on the note.<sup>4</sup> Our policies usually contain a clause giving the insurers a right to deduct or set off the premium due, against a loss. They would have this right as against the insured without any express agreement; but this clause secures to them their right, although the premium consists of the note of another party, if the note be unpaid.<sup>5</sup>

the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent: he is a principal to receive the money from the assured, and to pay it to the underwriters." But in this country there can be no question but that the underwriter can look to the assured in the first instance.

<sup>1</sup> *Ins. Co. of Penn. v. Smith*, 3 Whart. 520. See *Paterson v. Gandasequi*, 15 East, 62, 2 Smith, Leading Cases, 222, note.

<sup>2</sup> *Patapsco Ins. Co. v. Smith*, 6 Harris & J. 166; *Paterson v. Gandasequi*, 15 East, 62.

<sup>3</sup> *Ins. Co. of Penn. v. Smith*, 3 Whart. 520. The policy in this case was of such a form that others might be interested, but not necessarily, and it was held that the taking of the note of the agent was not a waiver of the right to

look to the principal. But if the agent applies for insurance "for self and others," and the underwriters take the note of the agent only, the principals are not liable, though they were not known when the insurance was effected. *Patapsco Ins. Co. v. Smith*, 6 Harris & J. 166.

<sup>4</sup> *Stackpole v. Arnold*, 11 Mass. 27.

<sup>5</sup> In *Hurlbert v. Pacific Ins. Co.*, 2 Sumner, 471, the insurance was for "H. & Co., for whom it may concern payable to H. & Co.," and by a clause in the policy all sums due to the company from the insured, when the loss should become due, were to be deducted. H. & Co. were mere agents for the parties in interest. It was held, in an action brought by H. & Co. for the benefit of the parties in interest, that the company could not set off debts due from H. & Co. in their own rights; but that the premium note, whether given by the agent or principal, was to be deducted, and that the words "the assured" applied not to the party who procured the insurance, but to him for whose benefit it was made. See also *Wiggin v. American Ins. Co.*, 18 Pick. 158; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, cited *ante*, p. 55, n. 1.

SECTION II. — *Of the Return of the Premium.*

THE premium, although due and payable in one sense as soon as the policy is made, is, in another, not due unless that risk is incurred for insurance against which the premium is paid.<sup>1</sup> If, therefore, there be no such risk, the premium cannot be claimed if it has not been paid, and, if it has been paid by cash or by a note, it must be returned. This rule gives to the insured the power of avoiding the contract, in whole or in part, after it is made; because this contract is, substantially, a promise by the insurers to indemnify the insured against a certain risk if that risk be incurred, and a promise of the insured in return to pay the premium to the insurers if their promise of indemnity attaches. If no part of the risk attaches, either because no part of the goods is shipped,<sup>2</sup> or because no part of the voyage takes place,<sup>3</sup> or because the insurance was predicated on a fact about which the parties were mistaken,<sup>4</sup> or because the insured had no interest,<sup>5</sup> or because the

<sup>1</sup> In *Tyrie v. Fletcher*, 2 Cowp. 666, Lord Mansfield, C. J., states the law as follows: "There are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and, therefore, he ought to return it. 2. Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards."

<sup>2</sup> *Martin v. Sitwell*, 1 Show. 156; *Graves v. Mar. Ins. Co.*, 2 Caines, 389;

*Waddington v. United Ins. Co.*, 17 Johns. 23; *Scriba v. Ins. Co. of N. A.*, 2 Wash. C. C. 107; *Toppan v. Atkinson*, 2 Mass. 365; *Bermon v. Woodbridge*, 2 Doug. 781; *Richards v. Mar. Ins. Co.*, 3 Johns. 307; *Murray v. Col. Ins. Co.*, 4 Johns. 443.

<sup>3</sup> *Forbes v. Church*, 3 Johns. Ca. 159; *Murray v. Col. Ins. Co.*, 4 Johns. 443.

<sup>4</sup> As a blockade. *Taylor v. Sumner*, 4 Mass. 56.

<sup>5</sup> *Routh v. Thompson*, 11 East, 428. In this case a Danish vessel was captured and taken into port before war was declared against Denmark, though subsequent to a proclamation by the king in council to detain and bring into port all Danish vessels. Insurance was made by order and on account of the captors. Held, that the captors had no claim of right, but only *ex gratia* of the crown, the vessel being seized before war was declared, and that they

vessel was unseaworthy and consequently the risk never attached,<sup>1</sup> the whole premium is returnable. And, generally, the premium is to be returned if the risk never commenced on account of a breach of warranty.<sup>2</sup>

But the assured cannot annul the insurance merely by serving on the underwriters a notice of his desire to put an end to the contract, if the voyage is not actually abandoned.<sup>3</sup>

Many insurance companies, by a clause in their policies, retain one half of one per cent on the premium returnable; but in some cases, other terms are agreed upon for the return premium. This half per cent is allowed by foreign laws of insurance, and may have been derived from them.<sup>4</sup> If the policy is on time at an

had no insurable interest and were entitled to a return of premium. In the subsequent case of *M'Culloch v. Royal Exch. Ass. Co.*, 3 Campb. 406, Lord *Ellenborough* ruled that if the premium was paid, and it afterwards appeared that the insured had no insurable interest, he could not recover back the premium after the safe performance of the voyage. This case, we think, is manifestly incorrect. The head-note of *Boehm v. Bell*, 8 T. R. 154, seems to support Lord *Ellenborough's* doctrine, but the case was decided on the ground that as the captors had an insurable interest, they could not recover back a portion of the premium, although their interest was not so great as they expected.

<sup>1</sup> *Porter v. Bussey*, 1 Mass. 486; *Taylor v. Lowell*, 3 Mass. 331; *Penniman v. Tucker*, 11 Mass. 66; *Russell v. De Grand*, 15 Mass. 35, 38; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21, 28; *Scriba v. Ins. Co. of N. A.*, 2 Wash. C. C. 107.

<sup>2</sup> *Murray v. United Ins. Co.*, 2 Johns. Ca. 168; *Elbers v. United Ins. Co.*, 16 Johns. 128; *Colby v. Hunter*, 3 Car. & P. 7; *Delavigne v. United Ins. Co.*, 1 Johns. Ca. 310; *Duguet v. Rhine-*

lander, 1 Johns. Ca. 360. But not if the breach is subsequent to the attaching of the risk. *Vos v. United Ins. Co.*, 2 Johns. Ca. 180.

<sup>3</sup> *New York Fire M. Ins. Co. v. Roberts*, 4 Duer, 141.

<sup>4</sup> *Emerigon*, ch. 16, § 6 (*Meredith's* ed.), p. 662, says: "The half per cent which is due to the insurers, in case of return, is granted them, not for damages and losses for the non-execution of the contract by the act of the assured, as Pothier pretends (n. 181), but rather for the trouble of having signed and put the party to bed on their money." The practice prevails at Lloyd's, where there is no stipulation against it. *Stevens on Average*, 206; 2 *Arnould, Ins.* 1238. It is the practice with many underwriters in the United States to insert a clause, fixing the percentage to be retained, in case the premium is returned. But we are not aware that it is the practice to retain part of the premium where there is no stipulation in regard to it. In Boston the usage is for the underwriter to return the whole premium. According to the usage on the Continent, the one half per cent is not to be returned in case the underwriter has been guilty of fraud. *Emerigon* (*Meredith's* ed.), p.



entire premium, there is no apportionment, although the loss takes place when only a small portion of time has expired.<sup>1</sup> And the rule is the same if a gross sum is to be paid at once, although it be calculated at a specified rate per month.<sup>2</sup> So, if insurance is effected "at and from" a place, it is no defence that the risk "from" the place was never incurred;<sup>3</sup> or that the ship was unseaworthy at the inception of the voyage if the risk once attached.<sup>4</sup> And an action for the return of premium on account of short interest will not lie if the interest of the party to the extent insured was covered at any time during the voyage.<sup>5</sup> But if a vessel is insured "at and from a port warranted to depart with convoy,"<sup>6</sup> or to sail on or before a certain day,<sup>7</sup> the risk is sever-

663. This usage is in accordance with the common-law principle that money cannot be held, when obtained by fraud. See *Marsh. on Ins.* 677.

<sup>1</sup> *Tyrie v. Fletcher*, 2 Cowp. 666.

<sup>2</sup> *Loraine v. Thomlinson*, 2 Doug. 585. In *Lovering v. Mercantile Mar. Ins. Co.*, 12 Pick. 348, a ship was insured for twelve months or until her arrival, at four and a half per cent per annum, and at the same rate for a longer or a shorter period, but warranting two and a half per cent for six months. The assured was not entitled to abandon for capture or detention until proof should be exhibited of the detention having continued ninety days. The ship was captured just before the expiration of the six months, and, after proof of detention for ninety days was exhibited, was abandoned. The abandonment was held to relate back to the time of the capture, and the underwriters to be entitled to a premium for only six months.

<sup>3</sup> *Col. Ins. Co. v. Lynch*, 11 Johns. 233; *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357.

<sup>4</sup> *Annen v. Woodman*, 3 Taunt. 299; *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56.

<sup>5</sup> *Howland v. Comm. Ins. Co.*, *Anthony*, N. P. 26.

<sup>6</sup> *Stevenson v. Snow*, 3 Burr. 1237.

In this case the insurance was on a vessel "lost or not lost at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage." The jury found that there was a usage in such a case to return part of the premium, without finding the proportion. Lord *Mansfield* held the risk severable, not on the ground of usage, because that was indefinite, but because "the principle was agreeable to the general sense of mankind." In *Long v. Allan*, 4 Doug. 276, the risk was held to be divisible on the express ground of usage. In *Gale v. Machell*, 2 Marsh. Ins. (3d ed.) 667, Park, Ins. 529, the question was not settled. See also *Rothwell v. Cooke*, 1 B. & P. 172.

<sup>7</sup> In *Tyrie v. Fletcher*, 2 Cowp. 666, Lord *Mansfield*, C. J., said: "A case of general practice was put by Mr. Dunning where the words of the policy are, 'at and from, provided the ship shall sail on or before the 1st of August.' . . . . A loss in port before the day appointed for the ship's departure can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the deter-

able, if a usage to that effect is proved. So, if the voyage is composed of severable passages, for which the risk is severable, a *pro rata* premium may be returnable because some of those passages were prevented. But generally, if the premium is entire, the risk is not severable, although the voyage consists of several passages.<sup>1</sup> If the insurance be on two subject-matters, as ship and cargo, and the ship goes without cargo, the premium on the cargo will be returnable.<sup>2</sup> And if a part only of the goods are shipped, then a due proportion of the premium is earned and a due proportion returnable.<sup>3</sup>

mination in *Stevenson v. Snow*, and that there were two parts or contracts of insurance, with distinct conditions." See also *Long v. Allan*, 4 Doug. 276; *Scott v. Rae*, cited 2 Doug. 787. But in other cases, where no usage was shown, the risk was held to be entire. *Meyer v. Gregson*, 3 Doug. 402; *Hendricks v. Com. Ins. Co.*, 8 Johns. 1.

<sup>1</sup> Thus in *Bermon v. Woodbridge*, 2 Doug. 781, the insurance was on a vessel "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur." The vessel deviated after leaving the coast of Angola. It was held that no part of the premium was returnable. See also *Moses v. Pratt*, 4 Campb. 297; *Tait v. Levi*, 14 East, 481. In *Homer v. Dorr*, 10 Mass. 26, the insurance was on a cargo from Boston to Archangel and back to Boston. The risk was held entire, although the usage in Boston was shown to be to sever it. And the same rule applies to charter-parties. In *Waters v. Allen*, 5 Hill, 421, the insurance was at and from New York to Monte Video and Buenos Ayres, and at and from thence back to New York. The premium was one and three quarters per cent each way. Held that, otherwise, the contract would

have been entire. And the risk was held to be severable in a case where the court said the spirit of the agreement showed that the parties so intended. *Donath v. N. A. Ins. Co.*, 4 Dall. 463, 471.

<sup>2</sup> *Amery v. Rogers*, 1 Esp. 207. In *Horney v. Lushington*, 15 East, 46, the insurance was for £ 3,500 on cargo and £ 1,000 on ship. The policy on the ship was avoided by the carrying of simulated papers, and that on the cargo because it was not loaded at the place agreed. No question appears to have been made as to the return of premium on the ship, but Lord *Ellenborough* said: "It seems to me, therefore, that, under the terms of this policy, the risk upon the *goods* never commenced, and there must be therefore a proportional return of premium."

<sup>3</sup> In *Holmes v. United Ins. Co.*, 2 Johns. Ca. 329, the insurance was to the amount of \$ 25,000, interest as might appear. The plaintiff's interest was less than \$ 13,000. There was a proportionable return of premium. *Kent, J.*, said: "There is no doubt but that, if property be insured to a larger amount than the real value, the overplus premium is recoverable, because the insurer shall not receive the price of a risk which he has not run." In *Pollock v. Donaldson*, 3 Dallas, 510, the

In a recent case in Massachusetts, there was insurance upon a whaling ship and outfits, with valuation. The premium was "six per cent if the risk ends within two years, and *pro rata* for a longer time." The risk did not end within the two years, but continued nine months longer. Two thirds of the oil catchings were taken out within the two years and shipped home in another vessel. Notice was given to the insurers of this shipment before the premium became due, but not until after the arrival of the ship insured. The question submitted to the court was, whether a *pro rata* premium was due on the catchings sent home, and it was held to be due.<sup>1</sup> The general rule undoubtedly is, that where the policy is a valued one, and no part of the subject insured is withdrawn during the risk, there can be no return of premium. In the above case the valuation was on the ship and "whaling outfits." But the catchings are considered as replacing the outfits, and the value, although in fact constantly fluctuating, as remaining the same.<sup>2</sup>

So if the subject-matter is so erroneously described that the policy does not attach, the premium is returnable; and this whether the error existed in the description itself, or the property was changed by the insured before the policy attached, so as to be without the reach and scope of the policy.<sup>3</sup> So if the policy is

insurance was on a cargo for six months "to be valued as interest shall appear."

On a voyage from Hamburg to Dunkirk, the value of the cargo was \$ 5,333, from Dunkirk back to Hamburg, \$ 1,500, and from Hamburg to Philadelphia, \$ 2,500.

The underwriters contended that fifteen per cent premium should be allowed for the whole \$ 5,333. But the court "allowed the premium of fifteen per cent upon the value of the different cargoes for the time that they were respectively on board the brig." See also *Forbes v. Aspinall*, 13 East, 333; *Foster v. United States Ins. Co.*, 11 Pick. 85; *Eyre v. Glover*, 16 East, 218. The same rule applies if the cargo be valued and only a part of the valued cargo be placed on board. See *ante*, as to valued policies.

<sup>1</sup> *Mut. Mar. Ins. Co. v. Swift*, 7 Gray, 256.

<sup>2</sup> *Mut. Mar. Ins. Co. v. Munro*, 7 Gray, 246.

<sup>3</sup> In *Robertson v. United Ins. Co.*, 2 Johns. Ca. 250, the insurance was on the ship. The only interest of the assured was as the holders of a bottomry bond. It was held that their interest was not covered under the general description, and that the premium should be returned. Emerigon, ch. vi. § 3 (Meredith's ed.), p. 129, mentions a case where a sloop was described as a ship, and the court held the insurance void, and ordered the premium to be returned. See next chapter as to description of subject-matter.

issued by a person who had no authority to issue it.<sup>1</sup> Although the parties may, after the contract is made, mutually agree to rescind it, in which case no action can be maintained on the premium note, yet where an insurance company, having become insolvent, voted to cancel its policies, and of this the insured had notice, but did not take any steps to have his policy cancelled, it was held that he was liable on the premium note.<sup>2</sup>

If an insurance be effected by one as agent, who becomes responsible for the premium, and the supposed principal does not adopt the transaction, it should seem that the insurers have still a right to the premium, if the principal could, by an adoption and confirmation of the policy, have entitled himself to claim of the insurer in case of a loss; for they have incurred the risk.<sup>3</sup> But

<sup>1</sup> *Lynn v. Burgoyne*, 13 B. Mon. 400.

<sup>2</sup> *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. 433.

<sup>3</sup> In *Hagedorn v. Oliverson*, 2 M. & S. 485, and in *Finney v. Fairhaven Ins. Co.*, 5 Met. 192, the insurance was effected for parties in interest without authority from them. The question was, whether they could ratify the act after a knowledge of the loss, so as to recover on the policy. It was held that they could, and the decisions were placed upon the ground that after the commencement of the risk the insurers would not have been liable to return the premium, even if the parties for whom the insurance had been effected had refused to ratify it. In *Hagedorn v. Oliverson*, p. 491, *Le Blanc, J.*, said: "I take it, that, after the ship sailed on the voyage insured, the plaintiff" (the agent) "was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been, *Schroeder*" (the owner) "is interested, and he may elect to adopt the insurance." See also *Routh v. Thompson*, 13 East, 274, 289. In *Steinbach v. Rhineland*, 3 Johns. Ca. 269, the ma-

jority of the court seemed to be of opinion that, in a case of this kind, the agent could recover the premium; but *Kent, J.*, gave a very able dissenting opinion in accordance with the doctrine laid down in the above cases.

In *Foster v. United States Ins. Co.*, 11 Pick. 85, a part owner effected insurance without authority for another part owner, and, after a loss, brought an action on the policy in his own name. The insurers defended on the ground that the other part owner never ratified the contract, and that it was therefore void. The court held the contract to be void, and that the premium should be returned. This case is supposed by *Mr. Phillips*, 2 vol. § 1827, to be in contradiction of the doctrine in the cases first cited in this note. But it does not so appear to us, and evidently was not so regarded by the court in *Finney v. Fairhaven Ins. Co.*, *supra*.

The principle upon which those cases must rest seems to be that of estoppel. As the agent does not assume to contract for himself, but only under an authority which proves to be void, he cannot be said to be bound by any actual contract. But as, by holding himself out as agent, he has induced the underwriter

this must be confined to insurances effected for parties in interest, who have given some authority, or appearance of it, to the agent. It cannot be that any person may make any owner or shipper liable for full premiums, without that owner's desire or knowledge, merely because that person calls himself their agent, and they have the power of adoption and ratification.

The general rules which we have already considered apply to the case of successive risks under the same policy as well as to a single voyage. Thus, if on a running policy the underwriters agree to insure all shipments on account of the insured made between certain ports within a fixed time, at a certain rate for each shipment according to its value, the insured is bound to pay the premium for every shipment.<sup>1</sup> But it would seem that if the policy was intended to cover only such shipments as the insured might elect to have indorsed, he would be liable for the premiums for no others. In other words, the underwriters are only entitled to the premiums if they would have been liable had the goods been lost.<sup>2</sup>

The doctrine of proportional or *pro rata* return of premium can hardly be considered quite settled. Our notes already made show that the cases conflict with each other, and some of them, at least, with acknowledged principles of insurance. The difficulty is in deciding when the premium is entire, and the risks also compose an inseparable whole, such that the beginning of a part is the beginning of the whole, and there can be no return of premium. Thus, if the insurance be on cargo "to and from" a certain place, and the ship arrives safely out and no return cargo is or can be provided, should the premium on the voyage "from" be returned?

In the present state of the authorities, the best conclusions would seem to be those we have already indicated. To restate

to run the risk of the owners' ratifying his act, he is estopped to set up that he had no authority. But if, as in the case of *Foster v. United States Ins. Co.*, the underwriters set up the want of authority, and urge that there is no contract on that ground, it is obvious that there is no reason why the agent should

not recover the premium. See also *Finney v. Warren Ins. Co.*, 1 Met. 16.

<sup>1</sup> *New York Fire M. Ins. Co. v. Roberts*, 4 Duer, 141.

<sup>2</sup> See *E. Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214; *Douville v. Sun Mutual Ins. Co. of New York*, 12 La. Ann. 259.

them, in other words, the parties may agree beforehand, and indicate in any way they please in the policy itself the terms and conditions of a return of premium. If the premium is entire, the presumption is, that it is not to be severed or returned in part; but this presumption may be rebutted, either by provisions of the policy indicating a different intention, or by a reasonable usage sufficiently established. There seems to be no necessity for any provision in the policy, or any special usage, to give the assured a right to a partial return of his premium for "short interest" or a deficiency in the subject-matter insured.

If there be many simultaneous policies on the same subject-matter, no one of which is beyond the interest, but all together are, as all make but one insurance, with mutual claim of contributions, there is a return of premium paid *pro rata* by all. If the policies are not simultaneous, the same rule seems to apply except in cases where the later ones were not made until after the former ones attached. Then it would seem, that, as a part of the earlier policies might have been held, without claim of contribution, for the loss of the whole property they insured, if that had taken place before the later policies were made, there should be no return of premium from these earlier policies; and it should follow that the later policies, made after the whole interest was covered, should return *pro rata*, according to the excess of the premium over what they could in any event have been liable to pay. But we think this whole subject stands in an obscure position, and needs the light of further adjudication.<sup>1</sup>

<sup>1</sup> The authorities cited *ante*, p. 288, 289, show that according to the modern English rule and the rule in the United States, unless affected by the "American clause," where there are several policies, whether simultaneous or not, covering in the aggregate an amount of property larger than that actually at risk, the loss, if any, must be borne by each insurer in proportion to the amount subscribed by him. It would seem to follow, from this rule, that if a part of the premium is, under like circumstances, to be returned for short interest, the return must be made by each in pro-

portion to the amount subscribed. The practical inconvenience of this rule has been pointed out by Mr. Stevens (*Stevens on Average*, p. 205), and by Mr. McCulloch (*McCulloch's Com. Dict. tit. Marine Ins.* p. 702), but it appears to be in accordance with the general principles of the common law. See *ante*, p. 288, n. 1, and *Marsh. on Ins.* 649; 2 *Arnould on Ins.* 1228. The late case of *Fisk v. Masterman*, 8 M. & W. 165, has introduced the reasonable modification of this rule laid down in the text. In that case insurance was effected on cotton, then on its way from Mobile to



The policies of this country usually contain a provision that the insurers shall return the premium upon so much of the interest insured as they shall be discharged from by any prior insurance;<sup>1</sup> and this clause, of course, is not applicable to an excess of insurance by simultaneous policies.<sup>2</sup> When there was over-insurance on the same policy, as where several underwriters subscribed the same instrument, it was formerly held that the first

Liverpool. On the 12th of April it was insured by several underwriters to the amount of £ 14,150; and on the 13th, to the amount of £ 22,300. For most of the insurance effected on the 12th a premium of fifty guineas per cent was paid, as the vessel was then out of time. But for the insurance effected on the 13th only from five to ten guineas per cent was paid, as the vessel had in the mean time been heard from. The whole amount of property on board was valued at about £ 30,000. An action was brought against one of the underwriters, who subscribed on the 12th, for a return of premium for over-insurance. The principle was urged that each underwriter should return his proportion of the premium without regard to the time of his subscription, and the authority of Mr. *Marshall* was cited. *Parke, B.*, said: "The cases put by *Marshall* on Insurance are where the insurance was effected before the risk commenced." It was held, that the underwriters who subscribed the policies on the 13th could retain their entire premiums, on the ground that between the 12th and 13th they would have been liable to the whole amount of their subscriptions had a loss occurred; but that the underwriters who subscribed the policies on the 12th should contribute ratably. It is obvious that the reason on which this decision is based will only apply to cases where the risk actually commences under the first insurance

before the second is effected, and the language of *Parke, B.*, as above cited, seems to indicate that he supposed the rule to be confined to such cases. Mr. *Arnould*, however, appears to regard the doctrine of this case as of more general application. 2 *Arnould on Ins.* 1229, 1230.

If the insurers first subscribing, in a case like this, are to retain their entire premiums, it should follow that they will be liable to the full amount of their subscriptions, and that the subsequent underwriters will only contribute ratably. See *ante*, p. 294, n. 1.

<sup>1</sup> In *New York Ins. Co. v. Thomas*, 3 Johns. Ca. 1, the policy stipulated to return fifteen per cent, "in case an insurance had been effected in Europe." It also contained the following clause: "Provided, that if the assured shall have made any other assurance upon the premises prior in date to this policy, then the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient, etc., and shall return the premium on so much of the sum assured as they shall by such prior assurance be exonerated from." Held, that the former clause referred to a prior insurance, and that there was to be no return for a subsequent insurance.

<sup>2</sup> *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, 153; *Potter v. Mar. Ins. Co.*, 2 Mason, 475.

underwriters were held for the whole, and the subsequent ones discharged.<sup>1</sup> But the law is otherwise now.<sup>2</sup>

In a recent case in New York, reinsurers, being sued for their premium, offered in evidence an oral bargain made before or at the time of making the policy, for the purpose of reducing the premium. But the court applied to the question the common rule, that the operation and legal effect of a written instrument shall not be varied or affected by proof of a prior or contemporaneous parol agreement relating to the subject-matter.<sup>3</sup>

Clauses have frequently been inserted in policies making the premium returnable on certain contingencies, as if the vessel sails with convoy and arrives; in which case, although a large part of the cargo insured is lost, if the vessel sails with convoy and arrives, the underwriters are liable.<sup>4</sup>

<sup>1</sup> *African Ins. Co. v. Bull*, 1 Show. 132.

<sup>2</sup> See *ante*, pp. 287 – 294.

<sup>3</sup> *St. Nicholas Ins. Co. v. Merc. Mut. Ins. Co.*, 5 Bosworth, 238.

<sup>4</sup> *Simond v. Boydell*, 1 Doug. 268. See also *Aguilar v. Rodgers*, 7 T. R. 421; *Horncastle v. Haworth*, Marsh. on Ins. 674; *Audley v. Duff*, 2 B. & P. 111; *Castelli v. Boddington*, 1 Ellis & B. 66, 16 Eng. L. & Eq. 127. In *Langhorn v. Allnutt*, 4 Taunt. 510, the jury found that, in case of a total loss on goods, the premium could not be recovered in addition to a total loss, although the event on the happening of which the premium was to be returned had taken place. The reason assigned was, that the amount of the premium might be added to the invoice price in making up the amount to be included in the total loss.

In *Ogden v. N. Y. Firem. Ins. Co.*, 12 Johns. 114, the voyage insured was from Malta to St. Petersburg, fifteen per cent to be returned, “if the risk ends in safety at Gottenburg.” It was held, that it was not necessary, in order to secure a return of premium, that the

vessel should actually arrive in safety at Gottenburg; but that the effect of this clause was to divide the risk, and that the fifteen per cent was to be returned in case the risk from Gottenburg to St. Petersburg was not run. In *Robertson v. Columbian Ins. Co.*, 8 Johns. 491, a condition on which the premium was to be returned was that “the risk end safely.” The part of the premium was returned, although the ship suffered much damage on the voyage, the underwriters having been discharged from the loss by a deviation. But it seems that, if the condition is the arrival of the vessel, it must actually arrive, and it will not be sufficient if the arrival is prevented by the happening of an event which discharges the underwriters. *Kellner v. Le Mesurier*, 4 East, 396. See also *Dalglish v. Brooke*, 15 East, 295.

In *Hunter v. Wright*, 10 B. & C. 714, the stipulation, in a policy on a vessel for one year, was “for a return of part of the premium, if sold or laid up, for every uncommenced month.” The vessel was laid up during several months, but was employed again during the

If there be any illegality or fraud on the part of the insurer, as if, before he makes the policy, he knows that the risk has terminated safely, he must return the premium, because he has never assumed the peril for which it pays.<sup>1</sup> But, generally, the mere avoidance of the contract of insurance by reason of illegality gives no right to return of premium, because both parties are equally in the wrong; and the maxim, *in pari delicto potior est conditio possidentis*, applies.<sup>2</sup> If, however, the illegality of the

year. It was held, that no part of the premium need be returned. Lord *Tenterden*, C. J., said: "I am of opinion that the words 'laid up,' being in company with the word 'sold,' must mean a permanent laying up, similar to that which would take place if the ship had been sold; that is, such a laying up as would put a final end to the policy." In *Poutz v. La. Ins. Co.*, 16 Mart. La. 80, it was held, that the entry of French troops into Spain was an act of war within a clause in the policy providing for a return of part of the premium in case no act of war took place between France and Spain, although war had not been formally declared.

<sup>1</sup> In *Carter v. Boehm*, 3 Burr. 1905, 1909, Lord *Mansfield*, C. J., said: "The policy would equally be void against the underwriter if he concealed; as if he insured a ship on her voyage, which he privately knew to be arrived; and an action would lie to recover the premium." See also *Duffell v. Wilson*, 1 Campb. 401.

<sup>2</sup> *Lowry v. Bourdieu*, 2 Doug. 468; *Andree v. Fletcher*, 3 T. R. 266; *Vandyck v. Hewitt*, 1 East, 96; *Morck v. Abel*, 3 B. & P. 85; *Lubbock v. Potts*, 7 East, 449; *Cowie v. Barber*, 4 M. & S. 16; *Juhel v. Church*, 2 Johns. Cas. 333. Consequently the underwriter cannot maintain an action on a premium note if the insurance was illegal. *Russell v. De Grand*, 15 Mass. 85. In

*Browning v. Morris*, 2 Cowp. 790, Lord *Mansfield*, C. J., said, after stating the general rule: "But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men,—the one, from their situation and condition, being liable to be oppressed or imposed upon by the other,—there the parties are not in *pari delicto*." It has, therefore, been held, that the premium paid for insuring lottery tickets may be recovered back. *Jaques v. Golightly*, 2 W. Bl. 1073; *Jaques v. Withy*, 1 H. Bl. 65. See also *Lacaussade v. White*, 7 T. R. 535. The question has arisen whether a party effecting an illegal insurance, and having paid the premium, has not a *locus pœnitentiæ*, so that he can rescind the contract, and recover the premium before a loss occurs. It was held that he might, in *Tappenden v. Randall*, 2 B. & P. 467; *Wharton v. De La Rive, Park, Ins.* 513; and in *Aubert v. Walsh*, 8 Taunt. 227. This view is also supported by *Buller, J.*, in *Lowry v. Bourdieu*, 2 Doug. 468. But in *Palyart v. Leckie*, 6 M. & S. 290, it was held, that, to entitle the assured to recover back the premium in such a case, he must have made a formal renunciation of the contract prior to the bringing of the action, although the adventure had never commenced; and Lord *Ellenborough*, C. J., expressed his regret that the rule of *locus pœnitentiæ* was ever adopted.

insurance was known to neither party when it was effected, the premium must be returned.<sup>1</sup> If the policy is avoided *ab initio* by a misrepresentation or concealment, the premium is to be returned,<sup>2</sup> unless the assured has been guilty of fraud.<sup>3</sup>

If the premium has not been paid, then the right to a return of it becomes simply a defence against any claim for it. But if it was paid by a negotiable note, which has been — or perhaps if it only might have been — put into circulation, the insured being

<sup>1</sup> Thus, where the insured is the subject of a foreign country, with which war has been declared, if the parties are ignorant of it at the time the insurance is effected, the premium may be recovered back. *Oom v. Bruce*, 12 East, 225; *Henry v. Staniforth*, 4 Campb. 270; *Hentig v. Staniforth*, 5 M. & S. 122.

<sup>2</sup> *Anderson v. Thornton*, 8 Exch. 425, 20 Eng. L. & Eq. 339; *Feise v. Parkinson*, 4 Taunt. 640.

<sup>3</sup> It seems formerly to have been the practice in Chancery to decree a return of premium, when a policy was decreed to be delivered up on the ground of fraud. See *Wilson v. Ducket*, 3 Burr. 1861, per Lord *Mansfield*, C. J.; *Whittingham v. Thornburgh*, 2 Vernon, 206; *De Costa v. Scandret*, 2 P. Wms. 170. And per *Lewis, J.*, in *Delavigne v. United Ins. Co.*, 1 Johns. Ca. 310. In *Wilson v. Ducket*, Lord *Mansfield* was in doubt whether or not in such a case the premium should be returned in a court of law. It was not necessary to decide the question in that case, as the premium was brought into court by the insurer. But it is now settled that in a court of law, where there is actual fraud on the part of the assured, the premium is not returnable. *Tyler v. Horne, Park, Ins.* 285, Marsh. on Ins. 652; *Chapman v. Fraser, Park, Ins.* 286.

In *Hoyt v. Gilman*, 8 Mass. 336, 340, the assured fraudulently withheld information material to the risk. It was

held, that he was entitled to no return of premium. See also *Schwartz v. U. S. Ins. Co.*, 3 Wash. C. C. 170; *Himely v. S. Car. Ins. Co.*, 3 Const. Rep. 154. In *Langhorn v. Cologan*, 4 Taunt. 329, the policy was void on account of an alteration made by the assured subsequently to the signing. Held, that the premium need not be returned.

In *Waters v. Allen*, 5 Hill, 421, the risk was divisible, and, during the first part, the policy was avoided by the fraudulent destruction of the vessel by the agents of the assured. It was held, that the premium was, nevertheless, returnable for the other part of the risk, on the ground that it was not necessary for the assured to set up his own fraud, but only the fact that there was no commencement of that part of the risk.

Mr. Phillips seems to be of the opinion, on the authority of a case stated by Mr. Ellis, *Duckett v. Williams*, Ellis on F. & L. Ins. 142, that, where a policy is void in consequence of the fraudulent misrepresentation of an agent without the knowledge of his principal, the latter may recover the premium. 2 Phillips, Ins. § 1845. But the true rule, deducible from the case cited, seems to us to be that where A has an interest in the life or property of B, and causes it to be insured, although the policy may be avoided by the fraudulent representations of B, still A can recover back the premium.

liable upon it to a third party, he is entitled to his return premium in the same way as if he had paid it in cash.<sup>1</sup> If a policy be assigned, the right to a return of premium does not pass with it.<sup>2</sup>

<sup>1</sup> See *ante*, p. 503, n. 3 and 4, as to the payment of premium in England. In *Hemmenway v. Bradford*, 14 Mass. 121, a promissory note had been given for the premium, which still remained unpaid, and had never been negotiated. *Per Curiam*: "It has been repeatedly decided in this court, that when the assured is entitled to a return of premium, he may recover the amount in an action for money had and received; although his note given for the premium should not have been paid. The underwriter, by the terms of the policy, expressly acknowledges the receipt of the

premium; and whether it was paid to him in cash, or in merchandise, or by a negotiable note, or in any other manner, the action to recover it back will still be in the same form." The giving of a promissory note is, in Massachusetts, *prima facie* payment. This view of the nature of a promissory note may have influenced this decision, so as to affect its weight as an authority in other courts.

<sup>2</sup> *Felton v. Brooks*, 4 Cush. 203; *Castelli v. Boddington*, 1 Ellis & B. 66, 16 Eng. L. & Eq. 127.

## CHAPTER XVI.

## OF THE DESCRIPTION OF THE PROPERTY INSURED.

THE property insured should be set forth in the policy, or the means of further description referred to, in such a way that the subject-matter of the insurance can be distinctly identified. This seems to be the only general rule on the subject; but there are many subordinate and subsidiary rules. And usually much latitude of construction is allowed in applying the terms used in a policy to the interest of the assured. For if the assured has concealed any fact respecting his interest which it is material for the insurer to know, the latter can set up the concealment as a defence. If there has been no concealment, it seems unjust that the assured should suffer, even if only a liberal construction can bring his interest within the terms of the policy. This seems to be a reason for construing policies of insurance in favor of the assured, with greater liberality than other contracts; and such, to some extent, appear to have been the policy and practice of the courts.

If the description be, on the whole, sufficient for identification, a mere mistake in a name or other part of it will not avoid the policy.<sup>1</sup>

<sup>1</sup> In *Ruan v. Gardner*, 1 Wash. C. C. 145, the agent of the insured, by mistake, described the goods as marked (D), on board the Brothers. The goods were on board the vessel named, but not marked as described. Mr. Justice *Washington* said: "It was perfectly immaterial to the risk what were the marks on the hogsheads, provided the risk undertaken by the underwriters was neither changed nor increased. Nor was this the case since it is in proof that the plaintiff shipped but five hogsheads on board the Brothers. If, indeed, he had had more, some marked D, and others with other marks, and a partial loss had happened, it would

not have been competent to the plaintiff to shift from one mark to another so as to alter the risk and possibly make the underwriters liable for hogsheads not insured. But this was not, and could not be, the case in the present instance."

In the common form of policies there is usually added to the name given to the ship the clause, "or by whatsoever other name or names the said vessel shall be named or called." It was once contended that this meant other names in addition to the one given in the policy, and hence that under a policy insuring the *Leopard* there could be no recovery for the loss of a ship called the



The subject-matter may be identified by the port of shipment,<sup>1</sup> or by the voyage, or by the consignee,<sup>2</sup> or by the time of shipment.<sup>3</sup> If a vessel in the trade referred to and belonging to the assured, or having cargo so belonging, answers accurately to the whole description, another which answers to it also but only imperfectly cannot be substituted for the first by evidence of intention.<sup>4</sup> But where different shipments come within the description in the policy, there it seems to be the rule that the insured may attach it to any of them by his declaration,<sup>5</sup> and he may so attach it by a *bona fide*

Leonard. But the court held otherwise, saying, that under this clause it was only necessary to prove the identity of the ship. *Hall v. Molineaux*, cited 6 East, 386. So a vessel called the President may be shown to be the one described as called "the American ship President." *Le Mesurier v. Vaughan*, 6 East, 382. And the "Tres Hermanas," to be the "Three Sisters." *Clapham v. Cologan*, 3 Campb. 382. In *Sea Ins. Co. v. Fowler*, 21 Wend. 600, there was an insurance on goods laden on board the brig Abeona. There were two vessels in the trade of the same name, one a brig and the other a schooner or half-brig. The goods were laden on board the latter. Held, that the burden was on the plaintiff to prove that, although the brig was mentioned, the schooner was the one meant. *Emerigon*, c. vi. § ii. (Meredith's ed.), 127, says: "All our authors agree that we must not refine too much on this point of the name of the ship, provided the error which has taken place does not prevent us from recognizing its identity."

<sup>1</sup> In *Murray v. Col. Ins. Co.*, 11 Johns. 302, the insurance was on all kinds of goods and merchandises, "from and immediately following the loading on board the said vessel at *Cagliari*." The only cargo shipped at *Cagliari* was a quantity of salt, although the whole

outward cargo was there taken out and reshipped; it was held, that the description applied only to the salt, and that that alone was covered by the policy. See also *Rickman v. Carstairs*, 5 B. & Ad. 651; *Hunter v. Leathley*, 10 B. & C. 858, 7 Bing. 517; *Grant v. Paxton*, 1 Taunt. 463.

It was before stated that words used in describing the subject of insurance are regarded as warranting that the subject shall be what it is described. Hence this subject of description is very intimately connected with that of express warranties.

<sup>2</sup> *Ballard v. Merchants' Ins. Co.*, 9 La. 258.

<sup>3</sup> In *Sorbe v. Merch. Ins. Co.*, 6 La. 185, "the contract was made to insure goods to be shipped from Havre, or any port south of it in France, and to be consigned to the insured, during a period of six months, to commence from the 1st of August, 1832." Some of the goods were on board before that time, but the vessel did not sail until after it. Held, that the goods loaded before the 1st of August were covered.

<sup>4</sup> *Sea Ins. Co. v. Fowler*, 21 Wend. 600.

<sup>5</sup> *Henchman v. Offley*, 2 H. Bl. 345, n.; *Kewley v. Ryan*, 2 H. Bl. 343. In this last case the insurance was "at and from Grenada to Liverpool on any kind of goods as interest should appear, in

declaration or designation made after the loss has occurred, if such appears to have been the intention of the parties.<sup>1</sup> But this rule should not extend so far as to cause a dangerous facility of fraud; and, therefore, the policy will be held to cover all the shipments of the insured which have been at risk, and come clearly within the terms of the policy, unless the insured has confined the policy to some part, or shown his purpose of doing so, by some act or designation made before the loss.<sup>2</sup> And if the policy be in the alternative, the insured may apply it to either of the alternatives in which he is interested, unless he is interested in both; in that

ship or ships on account of F. & R." There were two cargoes to which the policy would apply. The assured, in his letter directing insurance, had expressed an intention to apply the policy in question to the cargo which was lost, but this intention was unknown to the underwriter. The court said, that "the assured had clearly a right to apply such an insurance to whatever ship he thought proper, within the terms of it, for which the case of *Henchman v. Offley* was an authority." It seems that policies of this nature were not novel in practice, at the time of the case of *Da Costa v. Firth*, 4 Burr. 1966 (A. D. 1776), although that was the first case of the kind in Westminster Hall.

<sup>1</sup> *Harman v. Kingston*, 3 Campb. 150. The insurance was "on sugar and cotton, as might be thereafter declared and valued." No declaration of interest or valuation was made before the loss. Lord *Ellenborough* held, that the insured might recover as on an open policy, the interest being a matter of evidence at the trial; and said that the insured might, by duly declaring and valuing before loss, make it a valued policy. See also *Craufurd v. Hunter*, 8 T. R. 13, 16, note a.

In *Edwards v. St. Louis Perpetual Ins. Co.*, 7 Mo. 382, the insurance was "from St. Louis to port or ports, etc.,

indorsements on this policy to be evidence of property at the risk of the company under the same." The assured received no invoice or description of the goods before intelligence of the loss, but offered to indorse as soon as the description of the goods was ascertained. It was held, that the indorsement should have been made before the loss, and the case was distinguished from *Harman v. Kingston*, by reason of the different forms of expression in the two policies. See also *Douville v. Sun Mutual Ins. Co. of N. Y.*, 12 La. Ann. 259, cited *ante*, p. 326, n. 1. But in *E. Carver Co. v. Manuf. Ins. Co.*, 6 Gray, 214, where the policy stated that all sums placed at risk under the policy were to be indorsed thereon, the court held that if before the loss the insured intended to cover a certain shipment, they might declare it after the loss took place, if there was no want of reasonable diligence on their part. It was also held, that, after an abandonment and a suit brought on the policy, the claim was not waived by an indorsement of other risks, which would almost exhaust the policy, and the receiving back, by the assured, of the premium for the balance.

<sup>2</sup> See *N. Y. Fire Mar. Ins. Co. v. Roberts*, 4 Duer, 141. See also *ante*, p. 326, n. 1, p. 328, n. 1.

case, — as if the expression were “ship or cargo,” and both have been at risk, — the policy must attach ratably to both.<sup>1</sup>

Merchandise, or any equivalent word, as goods, or wares, does not apply to ornaments, or clothing, or other similar articles, if they are owned by persons on board, and are not intended in any way for sale.<sup>2</sup> “Cargo” means much the same thing as merchandise.<sup>3</sup> “Property” is much more comprehensive; and, indeed, it

<sup>1</sup> In *Faris v. Newburyport Mar. Ins. Co.*, 3 Mass. 476, the insurance was on the cargo or freight of the ship *America*, both or either to the amount insured valued at the same sum. The assured was interested both in the cargo and freight, and both were lost, but as he had recovered on a prior policy for the loss of the cargo, he contended that he could apply this policy to the freight alone. *Sewall, J.*, said: “To construe this insurance, at the election of the assured after the event, to be of the freight only, exclusive of the cargo, would establish a very unequal contract between these parties. This construction, for which the plaintiffs contend, is inadmissible, unless it appeared to be the unavoidable import of the words of the contract; which is far from being the case in this instance. The alternative in the original policy, especially connecting with the words ‘freight’ or ‘cargo’ the words ‘or either to the amount insured,’ which are separated by the description of the voyage, and have no meaning but in the proposed connection, more naturally imports an insurance of freight or cargo as interest shall appear. In this view of it, the contract may be explained; an insurance of freight or of cargo, in the event the insured should have only one of those descriptions of property at risk in the voyage insured; and if he should have both descriptions at risk, then it is an insurance upon both proportionably to the interest of the insured.”

<sup>2</sup> *Ross v. Thwaite, Park, Ins.* 25.

<sup>3</sup> In *Da Costa v. Firth*, 4 Burr. 1966, the words “goods and merchandise,” and in *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429, the word “cargo,” were held to apply to bullion on board unless it was intended for the expenses of the master, crew, or passengers. Under many foreign ordinances bullion would not be covered under the general term “goods.” See 1 Magens, 10. The description “goods and merchandise” will cover specie dollars. *Am. Ins. Co. v. Griswold*, 14 Wend. 399. See also *Seton v. Del. Ins. Co.*, 2 Wash. C. C. 175, 178, per *Washington, J.* In *Thomas v. Royal Exch. Ass. Co.*, *Dumpier, J.*, ruled at *Nisi Prius*, that an insurance on goods and merchandise would cover dollars if entered at the custom house, but not bank-notes. *Manning’s Dig.* 164 (ed. of 1820). No exceptions seem to have been taken to this ruling, as the case on appeal does not mention this point. 1 Price, 195. It was also held in *Wolcott v. Eagle Ins. Co.*, that the word “cargo” would not cover live-stock on board, or hay, corn, &c., put on board mainly for the subsistence of the stock, although there was an expectation that a considerable quantity of it would remain unconsumed if the vessel should have an ordinarily good passage, and would be sold as cargo at the port of discharge. *Weskett*, 260, tit. Goods, was cited where the general principle is laid down that “every person making insurance under the general expression

would be difficult to limit the meaning of this word.<sup>1</sup> The phrase "goods, specie, and effects" has been held by the usage of trade to cover a sum of money advanced by the master for the benefit of the ship, and for which he charged a respondentia interest.<sup>2</sup> In most cases the meaning of the terms used is strongly affected, if

of goods, ought not to conceal anything he may know to deserve a greater premium than is commonly given." Live-stock is generally insured *eo nomine*. See *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Coit v. Smith*, 3 Johns. Ca. 16. But it seems that, if live-stock is the usual or principal export from a place, the word "cargo" would include it without further description. *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 136; *Chesapeake Ins. Co. v. Allegre*, 2 Gill & J. 164. In *Hill v. Patten*, 8 East, 373, Lord *Ellenborough*, C. J., seemed inclined to hold that the word "cargo" in a policy on a whaling voyage would only apply to the homeward-bound cargo, consisting of the immediate produce and result of the fishing adventure. But in *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, *Shaw*, C. J., was inclined to think that it would apply to the outfits, though he gave no opinion on the subject, holding that it would protect "oil and other articles which are the ordinary products of the voyage from the time the vessel first began to take whales." The application of the word in such a case would probably be determined by usage. In *Rogers v. Mechanics' Ins. Co.*, 1 Story, 608, the word "catchings" in a policy on a whaling voyage was held to cover blubber or pieces of whale flesh, cut from the whale and on deck.

In *Hill v. Patten*, 8 East, 373, Lord *Ellenborough*, C. J., said: "Outfit, in a fishing voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, etc., and the disposing of them, when taken, in

such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage."

In *Pritchett v. Ins. Co. of N. A.*, 3 Yeates, 458, it was found by the jury to be the usage of Philadelphia to include profits under the word "goods." In *Hunter v. Prinsep*, Marsh. Ins. 316, it was held that the term "piece goods" would not apply to hats. In *Duplanty v. Commercial Ins. Co.*, Anthon, N. P. 114, a curricule was held to come under the description "goods, wares, and merchandise."

In *Palmer v. Pratt*, 2 Bing. 185, papers purporting to be bills of exchange, payable in thirty days after the arrival of the vessel, were described as "bills of exchange." It was held, that, as a bill payable on a contingency was void, the papers were worthless, and the insurable interest, if there was any, improperly described.

<sup>1</sup> In *Whiton v. Old Colony Ins. Co.*, 2 Met. 1, the word "property" was held to cover current bank-bills carried for the purposes of trade. *Shaw*, C. J., said: "But whatever the construction of a policy may be when the insurance is upon 'goods, wares, and merchandise,' we think there can be no doubt, that, under the larger term 'property,' money carried for the purchase of cargo or received for the sale of cargo would be included." This term also covers the commissions of the master. *Holbrook v. Brown*, 2 Mass. 280. See also *Wiggin v. Mercantile Ins. Co.*, 7 Pick. 271.

<sup>2</sup> *Gregory v. Christie*, 3 Doug. 419.

not determined, by the usage of the place where the contract was made.<sup>1</sup>

When the identification rests materially on the time of shipment, the phrase "between two certain days" excludes both of them.<sup>2</sup> The term "all lawful goods" includes all not unlawful by the laws of the country where the policy is made, whether they are or are not liable to seizure, as contraband or otherwise prohibited, abroad.<sup>3</sup>

Policies are often made on an outward-bound cargo, and "the return cargo," or "the proceeds" or "returns." This is intended generally to cover a homeward cargo, bought by the outward; but the first phrase may apply to the homeward cargo, if owned by the insured, however it was purchased; and the other phrases may apply to goods shipped on the return voyage, on the credit of an outward cargo, which has been pledged or assigned to be sold and pay for them.<sup>4</sup> But neither of these phrases will cover the same goods brought home again, unless they are aided in this application by evidence of usage.<sup>5</sup>

In general, whenever the policy indicates in any way that the subject-matter is to be changed in the course of the voyage, or the period for which insurance is effected, such change may be made and the policy continue to attach.<sup>6</sup>

<sup>1</sup> See *ante*, p. 89, n. 1.

<sup>2</sup> *Atkins v. Boylston F. & M. Ins. Co.*, 5 Met. 439.

<sup>3</sup> See *Seton v. Low*, 1 Johns. Ca. 1.

<sup>4</sup> *Haven v. Gray*, 12 Mass. 71; *Whitney v. Am. Ins. Co.*, 3 Cow. 210, 5 Cow. 712. In this latter case the insurance was on the outward cargo and the returns home, valued at \$14,000. The outward cargo was pledged to its full value, \$7,000, and goods were purchased therewith. The court held that if the outward cargo had been sold for \$7,000, and the return cargo purchased with the proceeds, the insured could have recovered to the amount of \$14,000, and the same rule applied where the property was pledged to that amount.

<sup>5</sup> *Dow v. Hope Ins. Co.*, 1 Hall, 166; *Dow v. Whetten*, 8 Wend. 160. In

this case the captain, on arrival at the outward port of destination, finding no market for the goods, brought them home again. They were damaged on the homeward voyage, and the owner claimed to recover on the ground that the term "proceeds" would cover the same goods if brought home. The Superior Court of New York City decided in favor of the defendants. An appeal was taken to the Supreme Court, and the plaintiff nonsuited. It then came up before the Court of Errors (8 Wend. 160), and the judgment of the Supreme Court was reversed solely on the ground that evidence was rejected tending to show a usage that the term "proceeds" was meant to cover the same goods if brought back.

<sup>6</sup> In *Coggeshall v. Am. Ins. Co.*, 3

It seems to be settled (as may be inferred from what has been already said on the subject of representation and concealment) that the interest of the insured need not, in general, be specified; as whether it be one half or one third of the property. So, a charterer, assignee, mortgagee, whether legal or equitable, mortgagor, trustee, consignee, carrier, may all of them insure their property or interest generally, without stating what it is; and generally any right to a percentage or share by way of commissions or compensation may be so insured, and need not be specified. But an open policy on a ship, or goods, or freight, as such, cannot apply to profits;<sup>1</sup> although the policy on goods is often made, by means of a valuation, to cover profits in fact.<sup>2</sup>

Insurance on the ship covers all that belongs to it, as hull, sails, rigging, tackle, apparel, or furniture;<sup>3</sup> and under this lat-

Wend. 283, the policy was on goods, "to commence from and immediately following the loading of the goods on board of the vessel." It was a time policy. It was held that goods substituted for those first placed on board were covered. See also *Grant v. Paxton*, 1 Taunt. 463; *Grant v. Delacour*, Ib. 465.

In *Crowley v. Cohen*, 3 B. & Ad. 478, the policy was on goods and boats containing the goods, at work on the canal between London, Wolverhampton, Birmingham, etc., "backwards and forward, and in any rotation," beginning the adventure upon the goods from the loading thereof on board, and continuing it till the same should be discharged and safely landed, with leave to discharge goods at all regular places on the line. The insurance was for £12,000, — £3,000 only to be covered in any one boat on any one trip. It was contended that as soon as goods to the value of £12,000 had been carried by each boat the policy was exhausted. It was held that the intention clearly was, that £12,000 should be insured upon each successive number of car-

goes; and, therefore, that the whole value of the goods afloat at the time of the loss, compared with £12,000, would afford the true measure of the defendant's liability.

<sup>1</sup> *Lucena v. Craufurd*, 5 B. & P. 269, 315. In *Wright v. Pole*, 1 A. & E. 621, insurance was effected by the proprietor of an inn on his interest in the inn and offices. Held that this would not cover a loss of profits while the inn was being repaired, and *Taunton, J.*, said: "I never heard before of a recovery of profits of a business as an incidental part of the loss, under an insurance upon a house or ship." So as to a theatre. *Niblo v. North American Fire Ins. Co.*, 1 Sandf. 551. See *Pritchett v. Ins. Co. of N. A.*, 3 Yeates, 458, 461, *ante* p. 522, note.

<sup>2</sup> See *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222.

<sup>3</sup> In *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. 468, it was held that an insurance "on a new bark now being built," covered only the vessel in process of construction, and not articles made for her, delivered in the shipyard where she was being built, and



ter title provisions have been included.<sup>1</sup> But the "outfits" of a whaling voyage are held not to be covered by a policy on the ship.<sup>2</sup>

Such things as anchors, boats,<sup>3</sup> charts, compasses, quadrants or sextants, chronometers, or the like, owned by the owner of the ship, and properly requisite and used for her safe navigation,<sup>4</sup> are insured under the word "ship." And whatever alteration or addition the vessel may undergo while so covered, by repairs, properly so called, she will still be within the insurance.<sup>5</sup>

intended to be attached to her as soon as she was ready to receive them. And in New York this principle has been carried to a still greater extent. Insurance was made "on a bark on the stocks building," etc. It was held that this did not cover timbers not united to the structure, although they were intended and completely prepared to be used in its frame-work, in the proper place for that use, and valueless for any other vessel. *Hood v. Manhattan F. Ins. Co.*, 1 Kern, 582, overruling the same case in the Superior Court, 2 Duer, 191. And the same principle has been applied to a house. *Ellmaker v. Franklin F. Ins. Co.*, 5 Barr, 183. See also vol. 1, p. 72, note.

<sup>1</sup> Provisions on board for the use of the crew were held to be covered by a policy on the ship and furniture, in *Brough v. Whitmore*, 4 T. R. 206, and the remark of Lord *Mansfield*, C. J., in *Robertson v. Ewer*, 1 T. R. 127, that "on a policy on a ship, sailor's wages or provisions are never allowed in settling the damages," was said to refer, not to the provisions taken on board as a part of the outfit, but to those purchased or used in a port where the vessel was detained. *Emerigon*, ch. 10, § 2 (Meredith's ed.), 234, says: "The expression 'on the body' embraces in its generality, as I have just said, all that regards the ship. Such are the hull of

the vessel, its rigging and apparel, munitions of war, stores, and victualling, advances to the crew, and all that has been expended in the fitting it out."

<sup>2</sup> *Hoskins v. Pickersgill*, 3 Doug. 222; *Gale v. Laurie*, 5 B. & C. 156, 164. See *Hill v. Patten*, 8 East, 373.

<sup>3</sup> *Hoskins v. Pickersgill*, 3 Doug. 222; *Hall v. Ocean Ins. Co.*, 21 Pick. 472. In *Blackett v. Royal Exch. Ass. Co.*, 2 Crompt. & J. 244, 2 Tyrw. 266, the boat was specifically insured, and the only question was whether parol evidence of a usage was admissible to show that underwriters never paid for boats on the outside of the ship slung on the quarter. The court held it was not. But evidence would be admissible, in such a case, to show that the boat was improperly carried, if at the stern or on the quarter, but the burden of proof would be on the underwriters. *Hall v. Ocean Ins. Co.*, *supra*.

<sup>4</sup> Such is the practice in Boston. 1 Phillips, Ins. § 468. But if it could be shown to be the practice for the master of the vessel to furnish these things on his own account, it might be questioned whether they would be covered by an insurance on the ship, unless a usage to that effect could be shown.

<sup>5</sup> *Le Cheminant v. Pearson*, 4 Taunt. 367. See *Livie v. Janson*, 12 East, 648; *Emerigon on Ins.* ch. 6, § 7 (Meredith's ed.) 144; *Malynes's Lex. Merc.* 128.

Freight is often insured in fact by a valuation of the ship; but an open policy on the ship does not include freight. If the insurance be on freight, *eo nomine*, and the insurance be for a specified period, or for successive voyages, the policy will in general attach to whatever freight may be actually on board at successive periods within the terms and scope of the policy.<sup>1</sup>

One who owns both ship and cargo may cover, by the word "freight," his interest in the transportation of his cargo to its destined market.<sup>2</sup> Freight "to" a place may be valid, although the cargo is destined to a subsequent port where alone the freight is payable; on the ground that this is but an insurance of the freight for a part of the way.<sup>3</sup> But freight "at and from" cannot cover freight "to" the same port.<sup>4</sup>

If freight be insured from one port to another, and the insured has leave to take in goods at intermediate ports, the freight on these goods is covered.<sup>5</sup> If the statement or description of the goods, or the notice to the insurer, be such that a policy would not have attached had it been made on goods, a policy on freight will not in general attach to the freight of these goods.<sup>6</sup>

<sup>1</sup> The great difficulty in applying the policy to successive voyages has arisen in the case of valued policies. It has been held, that whether the valuation of freight in such cases is to be applied to the freight at risk on each voyage, depends upon the intention of the parties. See *ante*, p. 276, n. 1.

<sup>2</sup> In *Dumas v. Jones*, 4 Mass. 647, the court differed in opinion on this question, but it seems now to be settled. See cases cited *post*, p. 527, n. 3. When a loss happens in such a case the owner can recover only the usual and reasonable rate of freight for the voyage at the port of departure, and not the profits he might have made. *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596.

<sup>3</sup> In *Taylor v. Wilson*, 15 East, 324, the voyage was from St. Ubes to Gottenburg, by way of Portsmouth. The insurance was effected on freight from St. Ubes to Portsmouth, and the des-

tinuation to Gottenburg was not disclosed to the underwriters. The vessel was lost before her arrival at Portsmouth. It was held, that the freight to Portsmouth could be recovered, overruling a *nisi prius* decision of Lord Kenyon, C. J., to the contrary, in *Murdock v. Potts*, Park, 399.

<sup>4</sup> *Bell v. Bell*, 2 Campb. 475. The policy was on freight "at and from Riga," and the policy was declared to be in continuation of other policies to Riga. The vessel was seized at Riga before the discharge of the outward cargo, but after the policy on the voyage to Riga had ceased to operate. It was urged that the policy, being in continuation of the previous ones, should cover the freight on the cargo to Riga. The court held otherwise.

<sup>5</sup> *Barclay v. Stirling*, 5 M. & S. 6.

<sup>6</sup> In *Adams v. Warren Ins. Co.*, 22 Pick. 163, the insurance was on freight

An assignee of freight for a valuable consideration, who has an interest subsisting at the date of the policy, which continues to the time of the loss, may insure it as freight.<sup>1</sup> And the word "freight" means equally the profit derived by the owner of a ship from carrying his own goods,<sup>2</sup> or the amount to be paid to the owner by a shipper whose goods he carries, or by a hirer of a ship, for its use,<sup>3</sup> or the profits of a hirer as *quasi* owner, from carrying his own goods, or the amount to be paid him for carriage by others.<sup>4</sup> Under some circumstances, the shipper of goods cannot, if he pays the freight in advance, recover it back on the ground that the voyage has not been performed. Whether in such a case he may insure the freight *eo nomine*, or whether the underwriters can avoid their liability on the ground that the freight might have been recovered back on the occurrence of a loss, are questions on which there is conflict of authority. It has been held that he may so insure. And it has also been held that the underwriters cannot avoid their liability on the ground that the freight might have been recovered back on the occurrence of a loss.<sup>5</sup> But it has also been held that this is not an insurable interest.<sup>6</sup>

If the charterer is to pay for the hire of the vessel only on her safe arrival at the port of destination, the owner may insure the amount of the charter-money as freight, but the charterer cannot, because, if the vessel is lost, he pays nothing and so loses nothing;<sup>7</sup>

generally. It was held, that it did not cover the freight of goods carried on deck. See also *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429.

<sup>1</sup> *Paradise v. Sun Mutual Ins. Co.*, 6 La. Ann. 596.

<sup>2</sup> *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N. C. 519; *Forbes v. Aspinall*, 13 East, 323; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Adams v. Pennsylvania Ins. Co.*, 1 Rawle, 97; *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. 346. See also *Allen v. Mackay*, U. S. Dist. Ct., Mass., 16 Law Reporter, 686.

<sup>3</sup> *Flint v. Flemyng*, 1 B. & Ad. 45; *Truscott v. Christie*, 2 Brod. & B. 320; *Moses v. Pratt*, 4 Campb. 297; *Thomp-*

*son v. Taylor*, 6 T. R. 478; *Horncastle v. Stuart*, 7 East, 400; *Robinson v. Manufacturers' Ins. Co.*, 1 Met. 143. See *Simmes v. Mar. Ins. Co.*, 2 Cranch, C. C. 618.

<sup>4</sup> *Clark v. Ocean Ins. Co.*, 16 Pick. 289.

<sup>5</sup> The right to so insure was asserted in *Kathman v. General Mut. Ins. Co.*, 12 La. Ann. 35. It was also held, in this case, that unless the answer specially denies the fact that freight was paid in advance, the fact need not be proved.

<sup>6</sup> *Minturn v. Warren Ins. Co.*, 2 Allen, 86. See also *ante*, p. 175.

<sup>7</sup> *Robbins v. New York Ins. Co.*, 1 Hall, 325; *Mellen v. National Ins. Co.*, 1 Hall, 452.

but it is said that, if a charterer has received goods on board from another party, who has engaged to pay him more than he is to pay for the hire of the vessel, he may now insure his interest in the freight.<sup>1</sup>

The questions which have arisen on this subject are certainly difficult, and the authorities have been thought to be irreconcilable. We think that principles may be found which will suffice to guide one through this apparent confusion. These cases are considered in our note.<sup>2</sup>

<sup>1</sup> Clark v. Ocean Ins. Co., 16 Pick. 289.

<sup>2</sup> Mr. Phillips (1 Ins. § 480) considers some of the decisions upon the application of the term "freight," in cases where there have been charter-parties, irreconcilable. But it seems to us, after a careful consideration of them, that they may be reconciled with each other and with principle. It must be kept in mind that freight must belong either to the absolute owner or to the owner *pro hac vice*. See opinion of Putnam, J., in Clark v. Ocean Ins. Co., 16 Pick. 289. It has been universally admitted that the owner may insure, under the term "freight," either what is to be paid him directly for the carriage of goods, or what is to be paid by a charterer. The difficulty is supposed to arise, when a charterer insures freight, in determining whether the term is to be applied, either to what he is to receive for carrying the goods of others, or to the increased value which he expects will accrue from the carriage of his own goods.

That it will apply to the former, provided the charterer has any interest at risk, is virtually decided in the case of Clark v. Ocean Ins. Co.; for it is obvious that, if the term "freight" will apply to that part of the amount to be so received by which it exceeds the amount to be paid under the charter, it will apply to the whole. The case of Riley

v. Delafield, 7 Johns. 522, does not appear to us to conflict with this doctrine. In that case the plaintiff had owned the vessel and had chartered her to K. He then sold the vessel to H., and it was agreed that the plaintiff should have the whole benefit of the freight for the voyage upon which she was chartered. The plaintiff then insured "on the freight" for that voyage, without making any disclosures as to the nature of his interest. It was held, that there could be no recovery. 1. Because "all the interest of the plaintiff was founded upon this special agreement, and it could not strictly or technically be denominated freight, since it was not an interest accruing to the plaintiff, as owner of the vessel for the use of her." 2. Because there was a material concealment. The first reason seems to be a sound one, for the plaintiff was not charterer, as the vessel was chartered to K., nor was he the general owner, nor in any sense could he be considered the owner *pro hac vice*, and the case, therefore, does not seem to conflict with the decision in Clark v. Ocean Ins. Co., or with the doctrine which we have supposed necessarily to follow from it. We find no other case which seems to conflict with it. In Mellen v. National Ins. Co., 1 Hall, 452, 463, the plaintiff, on the arrival of the vessel, was to receive a certain amount for carrying goods,

If a party has a lien on freight by advancing money upon it, he can insure his interest under the name of freight.<sup>1</sup>

There is a rule resting on public policy and expediency, that goods carried on deck are not covered by a general policy on cargo, or property, or goods.<sup>2</sup> But there prevails also an exceptional usage in some ports, to carry any goods on deck on certain voyages or passages; and in others, to carry particular goods in this way, on certain voyages. The cases are quite numerous on this subject, and present some anomalies. But whatever the usage may be, if

and to pay an equal or greater amount as charterer. Of course he would lose nothing if she did not arrive, and hence the court held, that he had no insurable interest.

We think it clear, therefore, on principle and authority, that a charterer may insure under the name of freight what he is to receive for carrying the goods of others, provided that amount is at his risk.

Another question is, whether a charterer can recover the increased value which accrues from the carriage of his own goods under the name of freight. From the cases cited *ante*, p. 527, n. 2, it appears that a general owner may recover this under the name of freight, and it would seem at first to follow that a charterer, or owner *pro hac vice*, could do the same. But it has been held otherwise, on the ground that the amount paid under the charter-party is to be considered the freight. *Cheriot v. Barker*, 2 Johns. 346; *Mellen v. National Ins. Co.*, 1 Hall, 452, 463.

<sup>1</sup> *Robbins v. New York Ins. Co.*, 1 Hall, 325; *Hall v. Janson*, 4 Ellis & B. 500, 29 Eng. L. & Eq. 111. See also *Winter v. Haldimand*, 2 B. & Ad. 649. In *Sansom v. Ball*, 4 Dall. 459, the plaintiff insured, under the term "freight advanced," a sum of money paid for the privilege of filling a part of the vessel. Evidence of usage was introduced

to show that that term was applied to the amount paid in that manner.

<sup>2</sup> *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Adams v. Warren Ins. Co.*, 22 Pick. 163; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Milward v. Hibbert*, 3 Q. B. 120. In *Taunton Copper Co. v. Merchants' Ins. Co.*, *Putnam, J.*, said: "The general rule unquestionably is, that a policy on goods or merchandise or property in general terms, on board a ship, does not extend to goods, property, or merchandise laden on deck." In both of the above cases the question was very elaborately discussed, and many foreign authorities were cited and commented upon. See the following note, and *Ross v. Thwaite, Park, Ins.* 25; *Backhouse v. Ripley, Ib.* 25; *Lenox v. U. S. Ins. Co.*, 3 Johns. Ca. 178; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 136. And the underwriters are not liable for a neglect to specify the cargo as being on deck, although a bill of lading stating the fact was handed to the secretary of the company, before the policy was issued, but which he did not open or read. *Smith v. Miss. Mar. & F. Ins. Co.*, 11 La. 142. In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, 269, insurance on a vessel and her appurtenances was held not to cover a hawser stowed in a boat upon deck, when it should have been in the hold.

it be distinctly established, and known, actually or constructively, to the insurer, we think it must countervail the general rule, and an insurance either on goods generally, or on freight generally, would apply to such goods in the same way as if they were carried in the hold.<sup>1</sup> And it has been held, where the "catchings" in a

<sup>1</sup> In *Milward v Hibbert*, 3 Q. B. 120, the precise question raised upon demurrer was, whether, in any case whatever, the ship-owner can recover of the underwriter the value of goods loaded on deck. After very elaborate arguments by Mr. Cresswell on one side, and Sir W. W. Follett on the other, and a most thorough consideration of the authorities, both English and Continental, by the court, it was held, that "the mere fact of stowing goods on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way increase the risk."

In *Da Costa v. Edmunds*, 4 Campb. 142, the court seemed to regard the question as one of concealment, and implied that, if the fact that goods were to be carried on deck were communicated, the policy would cover them. Under this view the only effect of a usage would be to obviate the necessity of making any representation, and it would not strictly be applied to affect the construction of the language of the policy. There are also *dicta* in the case of the *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108, which point in the same direction. *Putnam, J.*, said: "And we certainly agree, that if underwriters are informed of the kind of property, and such property is usually carried on deck for its own safety, particularly, as well as for the safety of the ship and the whole concern, they are to be answerable in the same manner as if they were

expressly told that the property was to be carried on the deck of the ship." This certainly implies that a communication of the fact that the goods were to be carried on deck would bring them within the contract, although there were no express agreement to that effect in the policy. But the obvious effect of this view of the case would be to avoid the policy *in toto* for concealment, if the carrying of the goods on deck is not communicated; whereas, if the doctrine applied to these cases is, that general terms in a policy will not ordinarily cover goods placed on deck, the policy remains valid as to goods not carried on deck, while those which are so carried are excluded from it. The latter view appears to be the one taken in *Milward v. Hibbert*, *supra*, and in the decision of *Taunton Copper Co. v. Merchants' Ins. Co.*, *supra*, and the nature of the usage required in the latter case is in conformity with that view. If the question were merely whether the assured should have communicated the fact that the goods were to be carried on deck, it would seem to be sufficient to show a usage to carry goods in that manner frequently, for this would put the underwriters upon inquiry, and that is sufficient to discharge the assured from the obligation to make representations, and it would not be necessary to show a usage of the underwriters to pay in such cases. But if it is incumbent on the assured to show that terms which ordinarily do not apply to goods on deck are, on the ground of usage, to be applied to them in any particular case,



whaling voyage were insured, and it was proved that the word included blubber which was usually carried on deck, that the underwriters were liable.<sup>1</sup>

it follows that a usage so to apply those terms must be shown. It is not enough to show that goods are sometimes or often so carried on a particular voyage: the very statement of the rule that goods so carried are to be excepted implies that it is well known that they are so carried. Merely increasing the number of exceptions does not change the rule, but a usage must be shown to dispense with the rule. *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Smith v. Miss. F. & M. Ins. Co.*, 11 La. 149. If it could be shown that the goods insured were usually carried on deck, the very fact of insuring such goods would show an agreement to dispense with the rule. So it has been held, that the rule does not apply to goods which can, with equal or greater safety to themselves and the cargo generally, be carried on deck. *Taunton Copper Co. v. Merchants' Ins. Co.*; *Da Costa v. Edmunds*.

But the fact that there has been a usage to stow goods not liable to injury from dampness on deck, if there is a

suitable cargo in the hold, was held not to be sufficient to charge the underwriters. *Taunton Copper Co. v. Merchants' Ins. Co.* *Putnam, J.*, said: "The usage stops in *limine*, or at most is only one step in the journey. The general rule of law which we have considered supposes that goods are carried on deck. . . . The usage does not find that underwriters have, in a single instance, ever paid a loss upon goods carried on deck, unless there has been a special contract, or unless from the nature of the property the underwriters were by law to be presumed to have undertaken that particular risk." We cannot see, however, any good reason for requiring that a usage for the insurers to pay should be required, if the usage of carrying certain goods on a certain voyage be established, and the insurers insured those goods for that voyage with a knowledge of that usage and without objecting to it.

<sup>1</sup> *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603.

## CHAPTER XVII.

## OF THE RISKS WHICH ARE COVERED BY THE POLICY.

SECTION I. — *Of the General Responsibility of Insurers.*

THE insured is never to be indemnified against his own act; nor against loss directly caused by his own personal misconduct.<sup>1</sup> And

<sup>1</sup> Emerigon, ch. xii. s. 11, § 1 (Meredith's ed.), 290, says: "It is then certain that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be, in fact, intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded upon first principles. It is delivered in the law *cum proponas*. It is applied to the contract of insurance by the Guidon, and is repeated in all our books. *Si casus evenit culpa assecurati, non tenentur assecuratores*. It is a general rule, from which it is not permitted to derogate by a contrary agreement: *Nulla pactione effici potest ne dolus præstetur*. As Pothier remarks: 'It is evident that I cannot validly agree with any one that he shall charge himself with the faults that I shall commit.'" The principle of the common law appears to be the same. See Skidmore v. Desdoity, 2 Johns. Ca. 77; Goix v. Knox, 1 Johns. Ca. 337; Chandler v. Worcester Mut. F. Ins. Co., 3 Cush. 328. But if the policy excepts loss by the design of the insured, the underwriters will be liable for loss occasioned by his negligence, unless it be so great as to amount to fraud. Catlin v. Springfield F. Ins.

Co., 1 Sumner, 434. In the case of Amicable Society v. Bolland, 2 Dow & C. 1, a case of life insurance, it was held that the insurers were not liable where the assured was executed for felony. And the court said that the law would be the same if the insurance had been specifically against a felonious death. This question was much considered in the recent case of Thompson v. Hopper, 6 Ellis & B. 937. It is settled, as we have already seen, that in England there is no implied warranty in a time policy. The vessel was sent to sea by her owners in an unseaworthy condition, they knowing the fact. Soon after sailing, it was found to be impossible to proceed owing to her condition, and she was brought up in an open roadstead, and while there, by an accident unconnected with her unseaworthiness, she was wrecked. If she had been seaworthy when she left the harbor, and had prosecuted her voyage without being brought up in the roadstead, there was strong reason for believing that she would have weathered the storm and reached her port of destination in safety. It was contended on this state of facts, that, as the proximate cause of the loss was a peril insured against, the underwriters were liable, although the remote

this principle has been carried so far as to discharge the insurers, where a total loss could be attributed to the owner's neglect in not furnishing funds.<sup>1</sup> But when this principle is applied to the misconduct of the agents of the insured, some qualification is necessary. The rule, in general, must be this: that the principal is liable for the defaults of his agents, when acting as such, and that he is not insured against loss thence arising,<sup>2</sup> unless it is clear that the insurer intended to take upon himself these risks. This may be made certain by express clauses in the policy, or by the customary and practical construction of common clauses. Barratry is expressly mentioned in the policy, and will be considered presently. The master, officers, and crew are the agents of the owner for many purposes; but the insurers should not be liable for a loss against which they insured the owner, if it be caused directly by such mistake, ignorance, or neglect of the master or crew as would show unseaworthiness. There is scarcely any department of the law in which the liability of a principal for the acts of his agent has not caused much difficulty; and this is eminently true of the law of insurance. One of the most difficult of these questions arises when

cause was the negligence of the owners. And it is difficult to see why this argument should not prevail, if the underwriters would be liable in such a case for the negligence of the master. There seems to be no reason why the underwriters should be responsible for the acts of the servant, and not for those of the owner. The doctrine *causa proxima non remota spectatur* would seem equally applicable. But the court held, as we think rightly, that the negligence of the owner was the *causa sine qua non*, and that the underwriters were therefore not liable.

<sup>1</sup> *Am. Ins. Co. v. Ogden*, 20 Wend. 287.

<sup>2</sup> Thus it has been held in England, that if the goods insured are libelled for salvage in the Admiralty Court, and the master neglects to tender a specific sum for salvage, and to offer to pay costs, the insurers are not liable for the ex-

penses incurred in that court. *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461. But we doubt whether such would be the rule in this country. So, if the goods are lost by capture, owing to the neglect of the captain to claim them as his own, there being an agreement to the effect that he should claim them existing between the captain and the insured, it has been held that the underwriter is not liable. *Himely v. Stewart*, 1 Brev. 209. And in *Vos v. United Ins. Co.*, 2 Johns. Ca. 180, 187, the court said: "The act of the master must be referred to his principal who appoints him, and whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it." See also *Goix v. Low*, 1 Johns. Ca. 341; *Andrews v. Essex F. & Mar. Ins. Co.*, 3 Mason, 6; *Howland v. Mar. Ins. Co.*, 2 Cranch, C. C. 474.

there is a loss caused by the unseaworthiness of the ship, but this unseaworthiness is caused by the negligence of the master and crew. We endeavor to present the existing condition of the adjudication on this subject in our note.<sup>1</sup>

<sup>1</sup> This question, how far the underwriters are liable for a loss caused by a peril insured against when the vessel is in an unseaworthy condition, owing to the negligence of the master and crew, does not seem to be entirely settled by the authorities. It is very clear that the underwriters do not insure against the negligence of the master and crew, nor against losses arising directly from such negligence. And it was formerly held in England, that, where the loss was the direct consequence of such negligence, no action would lie, although the immediate cause of the loss was a peril insured against. *Law v. Hollingsworth*, 7 T. R. 160. The negligence being regarded as the *causa sine qua non*, the efficient cause of the loss. But in *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73, it was held that the underwriters were liable for the loss of a vessel by a fire caused by the negligence of the mate in lighting a fire in a stove, and not seeing that it was properly extinguished, the fire being regarded as the proximate, and the negligence as the remote, cause of the loss. In this case the insurance was against fire and barratry, and the court held, that, as the insurers had undertaken to indemnify the plaintiff for the wilful misconduct of the master and crew, it was not too much to say that they also meant to indemnify him against a loss arising from the negligence of the same persons. But the Supreme Court of New York, in a very similar case, decided two years previous, said: "The very circumstance of assuming the risk of barratrous conduct affords a strong

presumption that the underwriters are responsible only for such misconduct as amounts to barratry." *Grim v. Phoenix Ins. Co.*, 13 Johns. 451, 458. This seems much more in accordance with principle than the reasoning of the English court. It is now, however, settled both in England and in this country, that, if the loss is caused by a peril insured against, the underwriters are liable, although the remote cause be the negligence of the master and crew, and this whether barratry be insured against or not. *Walker v. Maitland*, 5 B. & Ald. 171; *Shore v. Bentall*, 7 B. & C. 798, n.; *Bishop v. Pentland*, 7 B. & C. 219, 1 Man. & R. 49; *Dixon v. Sadler*, 5 M. & W. 405, 415, 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Waters v. Merchants' Louisville Ins. Co.*, 1 McLean, C. C. 275, 279, 11 Pet. 213; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, 276; *Firemen's Ins. Co. v. Powell*, 13 B. Mon. 311, 318; *Draper v. Comm. Ins. Co.*, 4 Duer, 234, 239; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Henderson v. Western Mar. & F. Ins. Co.*, 10 Rob. La. 164; *Georgia Ins. & Trust Co. v. Dawson*, 2 Gill, 365; *Am. Ins. Co. v. Insley*, 7 Barr, 223; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477, 496. In Ohio, it was held in several cases, that the underwriters were not liable in the case in point. *Gazzam v. Ohio Ins. Co.*, Wright, 202; *Jolly v. Ohio Ins. Co.*, Wright, 539; *Lodwicks v. Ohio Ins. Co.*, 5 Ohio, 433; *Fulton v. Lancaster Ohio Ins. Co.*, 7 Ohio, 5; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 276; but these cases have since been

If the fault of his servants subjects the ship-owner to a claim for compensation by the shippers of cargo, this does not, of itself, exonerate the insurers of the cargo,<sup>1</sup> although, if the shippers, in such a case, claim of the insurers, they must enforce their claim against the ship-owner for the benefit of the insurers, or transfer it to them, nor will any loss be attributed to the fault or misconduct of the master or crew, which can be as well accounted for by the perils insured against.<sup>2</sup>

The general principle, that one is answerable for the acts of his agent, only when those acts are done during the exercise of the agency, applies to the master and crew, so far that if they commit larceny, or violence, or any other crime, the owner cannot be responsible for this, nor lose his claim on the insurers for a loss arising from it, unless he can be connected with this act, either by the authority or directions he gave, or in some other way, and not merely by the fact that he appointed and employed them in his ship. Agents expressly appointed, or factors or consignees, represent the owner in all the business which they undertake, by his authority, to do for him, and he is liable for their acts or neglect while they so represent him.<sup>3</sup> But no one is an agent of the

overruled by *Perrin v. Protection Ins. Co.*, 11 Ohio, 147. In Massachusetts, it was held in an early case, that the underwriters were not liable for a capture occasioned by the negligence of the master. *Cleveland v. Union Ins. Co.*, 8 Mass. 308, but this doctrine is virtually departed from in the case of *Nelson v. Suffolk Ins. Co.*, *supra*. In *Waters v. Merchants' Louisville Ins. Co.*, *supra*, two questions were raised, first, whether the underwriters were liable for a loss occasioned by the barratry of the master and crew; and second, whether they were liable for a loss occasioned by the negligence of the same persons. Speaking of the first, Mr. Justice Story said: "We have no hesitation to say, that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its

proximate cause, as it concurs, as the efficient agent, with the element, *eo instanti*, when the injury is produced." There seems to be no good reason why the same line of argument should not apply to the case of a loss by negligence, but the court held that it did not. It appears to us impossible to reconcile these cases with the authorities cited, *ante*, p. 381, n. 1. See also *post*, § 3, of this chapter.

<sup>1</sup> *Cullen v. Butler*, 5 M. & S. 461, 466.

<sup>2</sup> See *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197.

<sup>3</sup> See *Tanner v. Bennett*, Ryan & M. 182; *Ludlow v. Col. Ins. Co.*, 1 Johns. 335; *Low v. Davy*, 5 Binn. 595. In *Wilbraham v. Wartnaby*, Lloyd & W. 144, the agent of the consignor at the port of destination, acting under the impression that the importation was prohibited, and that he was doing the best

owner for any purpose, although he performs a service for which the owner must pay, unless the owner voluntarily employed him: Therefore the owner is not responsible, so as to discharge the insurers, for a loss occasioned by a pilot whom he was required by law to take. Nor could he be for the loss caused by the ignorance or negligence of a pilot who was employed voluntarily, if he had exhibited to the master the customary evidence that he was duly commissioned. If, indeed, a master employed an incompetent person as pilot, whom he had no sufficient reason to believe competent, this would be an act of negligence on the part of the master, the effect of which upon the owner or insurers would be determined by the principles above stated. We have seen how much difficulty, and perhaps uncertainty, attends the question whether insurers are discharged by the wrongful acts of the master or crew, considered as agents of the owners. This difficulty in respect to the pilot, or the master's appointment of the pilot, or the master's interference with the pilot, is much increased by the diversity in the views of different courts respecting these questions. We give in our notes an abstract of the principal cases in which they have been considered.<sup>1</sup>

for all parties, gave information to the government, expecting thereby that he should obtain a restoration of the goods if they should be seized. They were seized before landing, and the underwriters set up in defence that but for the act of the agent they would not have been seized until after the expiration of the risk, but the court held them liable.

<sup>1</sup> The question of the respective rights and duties of the pilot and master has come up in several recent cases in England, in regard to the liability of owners of vessels for torts or acts of negligence of the pilot, it being held, under their pilots acts, as we shall presently see, that, if the injury is occasioned by the negligence of the pilot alone, the owners are not responsible, but otherwise if there is negligence in the master, either in acts of commission or omission. In

The *Girolamo*, 3 Hagg. Adm. 169, 176, the collision arose from the vessel's going on in a fog; and it was argued that the master was *in pari delicto* from not having interposed and brought the vessel up. Sir *John Nicholl* expressed a strong opinion in favor of this view, but left the point undetermined. In *The Lochlibo*, 3 W. Rob. 310, 1 Eng. L. & Eq. 651, it was held that it was solely the duty of the pilot to determine when the vessel should be brought up; and on appeal this decision was affirmed. *Pollok v. McAlpin*, 7 Moore, P. C. 427. The court said: "It was contended at the bar that in this case the impropriety of sailing through the Downs was so manifest that the captain ought to have refused, in spite of the pilot's opinion. But we cannot assent to this. It would be very dangerous to hold, that there can be any divided authority in



A very general rule, coming frequently into application, limits the responsibility of the insurers to extraordinary risks. We have

the ship with reference to the same subject; and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide." See also *The Maria*, 1 W. Rob. 95. It is the duty of the pilot to select the time and place of coming to anchor. *The George*, 2 W. Rob. 386; *The Massachusetts*, 1 W. Rob. 371. So when a vessel is taking her berth, the time and manner of dropping the anchor are exclusively within the province of the pilot. *The Agricola*, 2 W. Rob. 10. And the manner of catting it, preparatory to bringing up for the purpose of taking a berth, is within the province of the pilot. *The Gypsy King*, 2 W. Rob. 537. But in *Griswold v. Sharpe*, 2 Cal. 17, it was held, that it was the duty of the master or harbor-master to select a proper berth, and not the pilot's. But it is provided by statute that the pilot shall moor the ship safely where the master of the vessel or the harbor-master directs. Compiled Laws of Cal. ch. viii. § 24. In *The Diana*, 1 W. Rob. 231, affirmed *Stuart v. Isomonges*, 4 Moore, P. C. 11, it was held to be the duty of the master to see that a good lookout was kept, although a pilot was on board. The court said: "Although the directions of the pilot may be imperative upon them" (the master and crew), "as to the course the vessel is to pursue, the management of the ship is still under the control of the master." If two vessels are entangled together, and they can be separated by cutting away part of the rigging, it is the duty of the master to give orders about it. *The Massachusetts*, 1 W. Rob. 371. And in *The Christiana*, 7 Notes of Cases, 2, affirmed *Hammond v. Rogers*,

7 Moore, P. C. 160, it was held to be the duty of the master to have the top-gallant and main royal yards sent down when this was necessary. When the pilot is remiss in his duty, it is difficult to determine with precision to what extent the master is bound to interfere. In the case of *The Maria*, 1 W. Rob. 95, 110, Dr. *Lushington* said: "It would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected, both by the general principles of law and specific enactments, from liability for the acts of the pilot, would be most severely prejudiced." In *Netherlands Steamboat Co. v. Styles*, 40 Eng. L. & Eq. 19, — a case where, in consequence of a defective lookout, a barge was sunk by a swell caused by the steamer, — the court said that if the lookout had informed the pilot of the barge, and he had insisted on going on, the owners would have been discharged. See also *Pollok v. McAlpin*, *supra*; *The Christina*, 3 W. Rob. 27. But "it is the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication, or ignorance, or any other cause, to interpose his authority for the preservation of the property of his employers." *The Duke of Manchester*, 2 W. Rob. 470, 480. Affirmed on appeal. *Shersby v. Hibbert*, 6 Moore, P. C. 90. See also *The Christiana*, 7 Notes of Cases, 2; *Hammond v. Rogers*, 7 Moore, P. C. 160; *The Joseph*

already seen, that the insured always warrants, by construction of law, that his ship is able to encounter safely all ordinary risks, for

Harvey, 1 Rob. Adm. 306, 311. If the pilot goes below for a few minutes, leaving the second mate in command, with general directions how to steer, and a collision occurs partly through the fault of this officer, the ship is responsible. The Mobile, Privy Council, 20 Law Reporter, 172. In *The Lochlibo*, 3 W. Rob. 329, 1 Eng. L. & Eq. 651, 656, it was held that if there was a hail from the lookout to alter the helm, and the pilot altered it without exercising his own judgment, the owners of the vessel would be liable. Speaking of interference on the part of the master or crew, Dr. Lushington said: "I should never go the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or otherwise to keep as near the South Sand light, and *vice versa*, or to bring the ship up, was interfering, in the legal acceptation of the term, with the duties of the pilot; illegal interference is of a different description. If, for example, in this case the boatswain had called out to the men below to starboard the helm, or if the master called out to port the helm, it would be interference, but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success." If the owner is not obliged to take a pilot, the law only securing to him and appointing a sufficient pilot if he wishes one, it follows that the owner is responsible for injuries resulting from the default of the pilot. *The Attorney-General v. Case*, 3 Price, 302; *The Neptune*, 1 Dods. 467; *The Transit*, cited 1 W. Rob. 50; *The Eden*,

2 W. Rob. 442; *Yates v. Brown*, 8 Pick. 23; *Bussy v. Donaldson*, 4 Dall. 206; *Williamson v. Price*, 16 Mart. La. 399; *Pilot Boat Washington v. The Saluda*, U. S. D. C. S. Car., April, 1881; *The Bark Lotty*, Olcott, Adm. 329; *Smith v. The Creole*, 2 Wallace, C. C. 485; *The Carolus*, 2 Curtis, C. C. 69. In this case the vessel was going out of the harbor with a pilot on board who was employed by the owner of the vessel, and the vessel was held liable. Mr. Justice Curtis said: "If the pilot in charge of this ship had not been selected and employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then, under the authority of *Carruthers v. Sydebotham*, 4 M. & S. 77; *The Maria*, 1 W. Rob. 95; and *The Agricola*, 2 Ib. 10, the owners would seem not to be liable for the misconduct or mismanagement of the pilot. But in this instance the pilot has testified that he was employed by the owner of the ship; and no such case is made by the answer as would compel an owner to receive a pilot on board under the statute laws of Massachusetts."

In England it is well settled, that, if the pilot is alone in fault, the owners are not liable. *Bennet v. Moita*, 7 Taunt. 258; *Ritchie v. Bowsfield*, Ib. 309; *M'Intosh v. Slade*, 6 B. & C. 657; *The Christiana*, 2 Hagg. Adm. 183; *The Protector*, 1 W. Rob. 45; *The Maria*, Ib. 95; *The Duke of Sussex*, Ib. 270; *The Vernon*, Ib. 316; *The Agricola*, 2 W. Rob. 10; *The Fama*, Ib. 184; *The George*, Ib. 386; *The Batavier*, Ib. 407; *The Atlas*, Ib. 502; *The Gypsy King*, Ib. 537.

this is precisely what is meant by sea-worthiness ; and it amounts to an agreement to warrant the insurers against all ordinary risks.<sup>1</sup> And if a vessel be lost or injured, and the loss evidently arose from an ordinary peril, as from common weather, or the common force of the waves or winds, the insurers are not liable, for the very reason that the ship is warranted as able to withstand such assaults.<sup>2</sup>

And even if the peril itself be extraordinary, as stranding, the insurers are answerable only for such consequences of this as are extraordinary ; at least, not for such as are invisible, indefinite, and conjectural ; such as a straining, unless it is of a nature to cause a direct damage to the vessel.<sup>3</sup> So they are not liable

<sup>1</sup> *Crofts v. Marshall*, 7 Car. & P. 597. In *Barnewall v. Church*, 1 Caines, 217, 234, Mr. Justice *Thompson* said : "The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, not against the ordinary perils to which every ship must be exposed in the usual course of the voyage proposed." See also *Coles v. Mar. Ins. Co.*, 3 Wash. C. C. 159.

<sup>2</sup> See *post*, p. 542, n. 1.

<sup>3</sup> In *Sage v. Middletown Ins. Co.*, 1 Conn. 239, 243, the injury complained of by straining was of such a nature, that it could not be repaired, otherwise than by rebuilding the ship. The court said : "The allowance of such a claim would open a door for infinite fraud, imposition, and uncertainty, and end in the destruction of all that is valuable in insurance." The question came up, but was not decided, in *Peele v. Suffolk Ins. Co.*, 7 Pick. 254. *Parker*, C. J., said : "The mode of computation is of a very questionable character. . . . Indeed, we cannot but think there has been a straining of the cause, as well as of the vessel, in order to charge the underwriter." See also the dictum of *Putnam*, J., in *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 466. In *Giles v. Eagle Ins. Co.*, 2 Met. 140, the vessel

was repaired so as to be sea-worthy, and afterwards performed her voyages well, and was insured at the same premium and at the same valuation as before the damage, but the jury allowed for "damage of hogging and strain, \$ 835." It was proved that the whole body of the vessel was injured, that some of the timbers were lifted, some of her treenails started, and that the injury from the strain or hogging remained after the repairs, and affected, not only the beauty, but the strength of the vessel, and could not be perfectly repaired, except by rebuilding the vessel. The court held that the plaintiff was entitled to recover. *Putnam*, J., said : "We do not intend to shake the doctrine which we have recognized touching imaginary or theoretical strains. It may be, theoretically speaking, that whenever a ship takes the ground, all her timbers, from the keel to the water-ways, must of necessity be in some degree disjointed. But this is not such a case. Here the damage is actual, visible, and tangible. And if this vessel should hereafter take the ground, or encounter extraordinary seas, it is not to be expected that she would stand the shock as well as if her timbers had not been lifted and disjointed."

for the effects of time, or of wear and tear.<sup>1</sup> But though an old vessel, when injured, may require more repairs than a new one would, yet it has been held that the insured are entitled to have her put in the same condition she was in before the accident.<sup>2</sup> But this rule must be qualified, and we think should be stated as follows: The underwriters are liable for all damages caused by a peril insured against, which happens to a sea-worthy ship, even though this damage be greater than would have resulted had the vessel been stronger.

The underwriters are not liable for ordinary leakage; but this is sometimes expressly provided for. So should the rule be as to common breakage, or similar deterioration.<sup>3</sup> And if cables, sails, rigging, anchors, boats, or the like, give out and are lost, under ordinary circumstances, without peculiar strain or any known extraordinary risk, the loss will be attributed to wear and tear,<sup>4</sup> or insufficiency, according to the circumstances of the case which must determine this question. If a rope gives way, generally, it would be because it was not strong enough. If timbers are broken, the injury would generally imply extraordinary violence. If the damage or loss falls on the spars, the sheathing, or upper works, or boats, there must always be an inquiry into the circumstances of the case, into the degree of violence which caused the loss, and the manner in which the lost article was secured against injury. Thus, if a boat is lashed on deck, only extreme violence would tear it away. If hung from the davits, at the stern or side, it is easily lost by no uncommon peril, and it may be a question whether it was so secured at that very time as to be sea-worthy, that is, able to encounter the perils it must be expected to meet.

<sup>1</sup> *Fisk v. Commercial Ins. Co.*, 18 La. 77; *Coles v. Mar. Ins. Co.*, 3 Wash. C. C., 159; *Dupeyre v. Western M. & F. Ins. Co.*, 2 Rob. La. 457.

<sup>2</sup> *Fisk v. Commercial Ins. Co.*, *supra*.

<sup>3</sup> Mr. Benecké (Phillips's ed.), 443, says: "According to the custom at Lloyd's, the underwriters are liable for breakage and leakage only, if the vessel struck the ground with such violence as to derange her stowage. Whenever a loss for leakage is claimed in such cases,

the ordinary leakage to which the article would have been subject, without such an event, ought to be deducted."

<sup>4</sup> Thus, where an anchor is lost by the cable being chafed upon a rocky ground, it is not a loss by a peril of the sea. Valin, tit. Ass. art. 29; Benecké on Av. ch. 9 (Phillips's ed.), 379. See also 1 Phillips, Ins. § 1105; *Coles v. Marine Ins. Co.*, 3 Wash. C. C., 159; *Dupeyre v. West. Mar. Ins. Co.*, 2 Rob. La. 457.

So the indefinite deterioration of the ship by straining, the opening of seams, or but-ends, without a storm, or violence, and the like, are not covered by the policy.<sup>1</sup> Another rule, quite universal, exempts the insurers from all liability for a loss caused by the qualities of the thing lost. Articles of commerce which are subjects of insurance differ so materially in their liability to decay, that provision is made for this by the memorandum, as we have seen.

It is a part of this rule, that the insurers are liable for no subject-matter of insurance which is destroyed by reason of its own inherent defects or tendencies.<sup>2</sup> But this rule does not apply to tendencies which are called into activity only by a peril insured against. Thus, if hemp insured burns up or rots from spontaneous ignition or fermentation, it being known that this may happen if the hemp be damp, but not if it be dry, the question would be, whether it was damp or dry when it was put on board. If it were then damp, or if it were then dry but became damp through the fault or defect of the ship, the insurers would not be liable, either for the hemp, or for the ship, if the burning hemp destroyed the ship. But if the hemp were dry when laden, and was afterwards wet by reason of the straining of the ship in a storm, or by the shipping of a sea, or any like peril, then the insurers, whether on the ship or cargo, would be liable.<sup>3</sup>

## SECTION II. — *Of Losses arising from a Prohibited or Contraband Trade.*

THIS subject has already been considered in some of its relations. Here we would remark, that insurers are responsible for losses caused by a breach of the laws of foreign countries respecting revenue and trade, unless some express exception is added in their favor, provided they had, in any way, either notice or knowl-

<sup>1</sup> See *supra*, p. 539, n. 3.

<sup>2</sup> Emerigon, c. 12, § 9 (Meredith's ed.), p. 311.

<sup>3</sup> In *Boyd v. Dubois*, 3 Campb. 138, insurance was effected on hemp, on a voyage from London to the coast of Devonshire. On the voyage, a fire broke out in the night, and the greater

part of the cargo was consumed. Lord *Ellenborough* said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire which consumed it, upon the common principles of insurance law, the insured cannot recover for a loss which he himself has occasioned."

edge, or should have inferred from facts in their possession, that it was the intention of the insured to engage in such a trade.<sup>1</sup> And even if there be a warranty against prohibited trade, if goods specifically named are known to be prohibited at the port to which the ship is expressly destined, it has been held that the insurers are liable for a loss of the property by a seizure for a disregard of the prohibition.<sup>2</sup> It is, however, an unquestionable rule, that if the policy contains an exception of all risks from contraband, war, or illicit or prohibited trade, and a part of the property insured is exposed to that danger, and a loss accrues therefrom to that part or to the residue, the underwriters are not held, unless there is something in the policy which must be regarded as controlling or limiting that exception.<sup>3</sup> If such trade is intended, and no notice, and nothing equivalent to notice, is given to the insurers, they are not responsible for a loss caused by such trade.<sup>4</sup> But if, without

<sup>1</sup> See *ante*, p. 34, n. 3.

<sup>2</sup> *Seton v. Delaware Ins. Co.*, 2 Wash. C. C. 175. Insurance was effected on cargo to ports in Cuba and back, declared in a written clause to be on goods and specie, both or either, valued at a certain sum, with the usual printed clause of warranty against any charge or loss on account of any illicit or prohibited trade. Mr. Justice *Washington* admitted that the printed and written clauses were to be construed so as to give effect to both, but held that as specie would have been included in the general term "goods," and as specie was known to be prohibited, the clause meant "we do not know what the goods are, we therefore do not insure them against illicit or prohibited trade, but we do insure the specie." In a *nisi prius* case in New York, the decision was put on the ground that the printed clause was controlled by the written. *Van Ness, J.*, said: "There can be no question but that the insurers assume the contraband risk, when contraband articles are set forth and expressly named in the policy. Such specifica-

tion must be considered as notice to the insurer, and will control the printed clause." *Howland v. Comm. Ins. Co.*, Anthon, N. P. 26. But in *Goicoechea v. Louisiana State Ins. Co.*, 18 Mart. La. 51, the court held, that, as the printed and written words would stand together, the latter should not control the former, but the insurers should be held only for loss caused by perils of the sea on the voyage, and not for illicit trade, although the cargo was described in the policy as Spanish, and was condemned on that account. And it is clear, that, where the warranty is in writing, the underwriters are not liable. *Church v. Hubbard*, 2 Cranch, 187, 232; *Higginson v. Pomeroy*, 11 Mass. 104.

<sup>3</sup> See *post*, § 9.

<sup>4</sup> Thus in *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, 17, Mr. Justice *Story* said: "It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage. This is the



any such intention, there was an actual violation of some foreign law without the knowledge or the default of the owner or his agents, the insurers may be responsible. This question is, however one of some difficulty. Thus, if war begins after the policy is made, the insurers are held for any loss caused by violation of any ordinances or rules springing from a state of war, unless such notice reaches the insured or his agent as makes the violation of these rules or ordinances his default.<sup>1</sup> If there is a loss by capture for a pretended violation of a blockade which did not actually take

general doctrine of foreign maritime writers, and has been recognized in the fullest manner by the common-law tribunals." See 2 Valin, lib. 3, tit. 6, art. 49; *Richardson v. Maine Ins. Co.*, 6 Mass. 102; *Parker v. Jones*, 13 Mass. 173. See also *ante*, p. 364, n. 3.

<sup>1</sup> *Wood v. New England Mar. Ins. Co.*, 14 Mass. 81. In this case the policy contained the following memorandum: "It is understood the company are not liable for any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce." The vessel was captured by a French vessel under the Milan decree, which had not been promulgated at the time the policy was made, on the pretext that the ship had come from a British port, and had been spoken with by British cruisers. It would appear, by the language of the court on page thirty-six, that the policy contained the usual clause insuring the vessel against arrest and detention, and the only question, therefore, was whether the Milan decree was an existing regulation within the memorandum; and the court held that it was not.

In *Archibald v. Mercantile Ins. Co.*, 3 Pick. 70, and in *Parker v. Jones*, 13 Mass. 173, it was held that if a voyage is prohibited, and both parties are igno-

rant of the fact, the insurers are not liable. And in a case where a vessel sailed for a port which was at the time blockaded, both parties being ignorant of the fact, and the master, on learning it, discontinued his voyage and sailed for home, but was captured on the way, it was held that the underwriters were only liable for losses by perils insured against up to the time of the discontinuance of the voyage. *Richardson v. Maine Ins. Co.*, 6 Mass. 102. In *Andrews v. Essex F. & M. Ins. Co.*, 3 Mass. 6, 18, the port of destination was restricted from foreign trade, but it was believed by both parties that the trade would be lawful before the vessel arrived. In point of fact, the port was not open and the vessel was seized. It was argued that the underwriters, having insured the voyage to the port of destination, must be presumed to warrant an entry into the port for the purpose of inquiry. But Mr. Justice *Story* said: "The true principle seems to me to be this, that the policy guarantees an indemnity in going to the port against all losses by the perils insured against; and unless the peril of illicit entry at the port be contemplated as one of the risks insured against, the underwriters are not held." See also, in respect to the question whether a denial of entry at the port of destination is a risk within the common policy, *post*, § 7.

place, and the capture is therefore illegal, it would seem that the insurers should not be discharged.<sup>1</sup>

### SECTION III. — *Of the Meaning and Extent of Perils of the Sea.*

#### A. *Of Perils generally.*

THOSE usually enumerated in American policies are perils of the sea, fire, barratry, theft, piracy, capture, arrests, and detentions.<sup>2</sup> The general clause "all other perils" is usually restricted in its extent and operation by the enumerations of the perils in the policy, and embraces only other perils of the like kind. The phrase "perils of the seas" covers all losses or damage which arise from the extraordinary action of the wind and sea,<sup>3</sup> and from

<sup>1</sup> *Sawyer v. Maine F. & M. Ins. Co.*, 12 Mass. 291.

<sup>2</sup> The common clause in the English policies enumerating the perils is as follows: "Touching the adventures and perils which we, the assurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, quality, or condition soever, barratry of the masters and mariners, and of all other perils, losses, or misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship," etc. *Vaucher's Guide, Mar. Ins.* 88; 2 *Arnould, Ins.* 792. This clause has been modified in form in most of the American policies, and some changes have been made in the substance.

The perils usually enumerated in the Boston policies are, "of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people of what nation or

quality soever, barratry of the master, unless the insured be owner of the vessel, and of mariners, and all other losses and misfortunes which have or shall come to the damage of the said —, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston." And they are substantially the same in our other commercial cities.

<sup>3</sup> What are ordinary and what extraordinary perils, is a question of much difficulty. In *Magnus v. Buttemer*, 11 C. B. 876, 9 Eng. L. & Eq. 461, a vessel, in the ordinary course of her voyage, moored in a tide harbor, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held that the underwriters were not liable. In *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197, under very similar circumstances, Mr. Justice Story held, that, unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would be a peril of the sea. And in *Bullard v. Roger Williams Ins. Co.*,

inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as capture and the like.<sup>1</sup> But the destruction of a ship by worms is not a "peril of the sea," because it is not an *extraordinary* circumstance. In certain waters, and at certain seasons, it is a natural result of causes always in operation, which are to be expected,<sup>2</sup> and it may be likened to a loss by wear and tear.<sup>3</sup> And so, if loss or damage be caused by rats or other vermin, it would seem that the insurer would not be liable unless the owner or the master had done all that could be done by any reasonable exertions or means to extirpate them, and without success.<sup>4</sup>

<sup>1</sup> Curtis, C. C. 148, Mr. Justice *Curtis* held, that, although the law required vessels to be sufficiently strong to resist the ordinary action of the sea in the voyages for which they might be insured, yet the ordinary action of the wind and sea did not mean the winds and sea to be ordinarily met in the voyage insured. He accordingly held that heavy cross-seas were not the ordinary action of the sea within the meaning of this rule, however common they might be in the voyage insured. And in *Washington Mut. Ins. Co. v. Reed*, 20 Ohio, 199, underwriters on whiskey on board a flat-boat were held liable for a loss occasioned by the swell of a steamboat, although the steamboat and the swell were of ordinary size and of constant occurrence.

<sup>2</sup> *Schieffelin v. New York Ins. Co.*, 9 Johns. 21.

<sup>3</sup> *Rohl v. Parr*, 1 Esp. 445; *Hazard v. New England Mar. Ins. Co.*, 1 Sumner, 218, 8 Pet. 557.

<sup>4</sup> *Martin v. Salem Mar. Ins. Co.*, 2 Mass. 420.

<sup>5</sup> In *Hunter v. Potts*, 4 Campb. 203, goods were insured on a voyage from London to Honduras with leave to touch at Antigua. While at the last-named port, the timbers of the vessel were so damaged by rats that a survey

was called, and the vessel condemned. Lord *Ellenborough* held that the underwriters were not liable. Chancellor *Kent*, 3 Comm. p. 300, says: "The better opinion would seem to be, that an insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity." But in *Garrigues v. Coxe*, 1 Binn. 592, a leak occasioned by rats, without the neglect of the captain, was held to be a peril within the policy.

In *Dale v. Hall*, 1 Wilson, 281, a common carrier was held liable for damage done to goods by rats gnawing a hole in the vessel. So in another case where the rats gnawed the goods. *Aymar v. Astor*, 6 Cow. 266. In a similar case in England, *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & Eq. 510, where a cargo of cheese was damaged by rats, the defence was set up that the captain had two cats on board. This would have been sufficient to exonerate the carrier according to the maritime law. *Consolato del Mare*, c. 65, 66; *Casaregis*, disc. 23, n. 73; *Roccus*, n. 58; *Emerigon*, c. 12, s. 4, § 7 (Meredith's ed.), 302. But the court held that the carrier was liable, on the ground that damage done

If goods are damaged by actual contact with sea-water, the underwriters are certainly liable,<sup>1</sup> and it has been held that if part of the cargo is damaged by sea-water, and the vapor and gases arising from it injure another portion of the cargo which is insured, the underwriters on this latter portion are liable, although it was not immediately in contact with the sea-water.<sup>2</sup>

Damage caused by a vessel's grounding or stranding is a loss by a peril of the seas within the policy, provided it does not happen

to goods by rats was not a peril of the seas, it being "a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." The court said: "We further are very strongly inclined to believe, that, in the present mode of stowing cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it."

But the question still remains, whether the underwriter would not be liable in case the rats should eat a hole in the ship, and water should enter and damage the cargo. In *Laveroni v. Drury*, *supra*, *Pollock*, C. B., said such a case might very likely be one of sea damage. And *Alderson*, B., added: "Our judgment does not touch that question. A rat making a hole in a ship may be the same thing as if a sailor made one."

On the authority of the recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage by water was the proximate cause of the loss, but should not hold them liable if the goods were gnawed by the rats, that not being a peril peculiar to the sea.

<sup>1</sup> *Baker v. Manuf. Ins. Co.*, 12 Gray,

603; *Cogswell v. Ocean Ins. Co.*, 18 La. 84.

<sup>2</sup> *Montoya v. London Ass. Co.*, 6 Exch. 451, 4 Eng. L. & Eq. 500. See also *Rankin v. Am. Ins. Co. of N. Y.*, 1 Hall, 619. But in *Baker v. Manuf. Ins. Co.*, Sup. Jud. Ct., Mass., March T. 1851, 14 Law Reporter, 203, it was held that the underwriters were only liable for the damage done to those goods with which the sea-water came into actual contact, although the plaintiff offered to prove that the injury was not caused by the usual dampness in a vessel's hold, but by the steam and moisture arising from goods damaged by an unusual quantity of water entering the hold in consequence of a peril of the seas. We have examined the policy in this case, and find that it did not contain the clause, now common in Boston policies, which exempts the underwriters from loss of this kind, and which is as follows: "It is further agreed that the insurers shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or mouldy, unless the same shall be caused by actual contact of sea-water with the articles so damaged." In a case where the policy contained this clause, it was held that the burden was on the assured to show that the damage was caused by actual contact with sea-water. *Leftwich v. St. Louis Perpet. Ins. Co.*, 5 La. Ann. 706.

in the usual course of navigation, as where a vessel is destined to a tide harbor, where she expects to take the ground when the tide ebbs.<sup>1</sup> And in such a case, if there be a heavy swell, which causes the injury, the underwriters are liable.<sup>2</sup> It is sometimes necessary to heave a ship down; and, if she is injured while this is being done, there seems to be no good reason why it should not be considered as having happened by a peril of the sea, but it has been decided otherwise.<sup>3</sup> Such a damage would, however, be included within the general clause.<sup>4</sup>

If a ship be not heard from, after a reasonable time it will be presumed that she has perished; and in the absence of all evi-

<sup>1</sup> See the cases of *Magnus v. Buttemer*, 11 C. B. 876, 9 Eng. L. & Eq. 461; and *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197, cited *ante*, p. 542, n. 1. In *Firemen's Ins. Co. v. Powell*, 13 B. Mon. 311, the policy did not expressly insure against loss or injury from grounding, but provided that the assured were not to abandon, as for a total loss, on account of the steamboat's grounding or being otherwise detained. It was held, that, as grounding was one of the perils to which steamboats were liable, and as it was not specially excepted, it was included in the policy.

<sup>2</sup> *Fletcher v. Inglis*, 2 B. & Ald. 315. This case was distinguished from that of *Magnus v. Buttemer*, *supra*, on the ground that the damage was not caused solely by the ship's taking ground in the usual course of her navigation, but by a heavy swell.

<sup>3</sup> *Rowcroft v. Dunsmore*, before Lord Kenyon, C. J., cited in *Thompson v. Whitmore*, 3 Taunt. 227, as follows: "The ship was hove down, and while heaving down she could not bear the strain: she was drawn on the land, where she bilged; and the question was made, whether, it being necessary to perform this operation on her, this damage was occasioned by a peril of the sea. Lord Kenyon thought it was not

a loss by a peril of the sea, but an accident that happened." In *Thompson v. Whitmore*, 3 Taunt. 227, the vessel had been placed on the beach to be cleaned and calked, in a situation where vessels of the same size had been placed for repairs, and had remained in safety. The vessel lay one day in safety, but the next day when the tide rose she was found to be full of water, and the planks of the side on which she lay, and some of her foot-hooks were broken. "*Mansfield*, C. J., thought, that although the tides knocked away the shores which supported the vessel, and thereby occasioned the mischief, yet, as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea." This opinion was held to be correct by the full court. See also *Phillips v. Barber*, 5 B. & Ald. 161, in which case the court held that where a vessel was in a graving dock being repaired, in which there were two or three feet of water, and, while there, was by the violence of the wind and weather blown over and bilged, this was not a loss by the perils of the seas.

<sup>4</sup> *Ellery v. New England Mar. Ins. Co.*, 8 Pick. 14; *Phillips v. Barber*, 5 B. & Ald. 161.

dence or opposing circumstances, the presumption of law will be that she has perished by reason of some peril of the sea; for in point of fact this presumption will be probable and reasonable. But the length of time which must elapse before this presumption arises must depend upon the peculiar circumstances of each case.<sup>1</sup>

The voyage of the ship may be greatly lengthened, and her return to port delayed, by circumstances which will give rise to the question, whether the insurers are liable for the loss and expense thence arising. From the adjudications of this country, it would seem, that if a vessel goes out of her intended course in fact, and in good faith, for the purpose of refitting herself, and repairing damages which have arisen from a peril insured against, she goes and remains, while thus necessarily deviating, at the expense of the underwriters; and that the costs incurred by the owner, for wages and provisions of the crew during the repairs, and during

<sup>1</sup> *Gordon v. Bowne*, 2 Johns. 150; *Brown v. Neilson*, 1 Caines, 525. In this case a vessel insured on a time policy, twenty-four days before the expiration of the risk, set sail from Norfolk in Virginia, bound to New York, and was never heard from. The usual passage was from five to seven days, though there was evidence of one case where a vessel arrived safe after a voyage of forty days, and another after a voyage of sixty days. The court held that there was no time fixed by law after which a missing vessel should be presumed to be lost, and that it would not be reasonable to calculate on the utmost or greatest limit. See also *Patterson v. Black*, 2 Marsh. Ins. 781; *Watson v. King*, 1 Stark. 121; *Houstan v. Thornton*, Holt, N. P. 242. The plaintiff must prove that when the vessel left the port of outfit she sailed on the voyage insured, and the convoy bond, executed at the custom-house, in which the port of destination is mentioned, is *prima facie* evidence of this

fact. *Cohen v. Hinckley*, 2 Campb. 51. When a vessel sails for a foreign port, it is not necessary to prove that she never arrived there, by witnesses from that port. *Twemlow v. Oswin*, 2 Campb. 85. Where goods are insured by a certain ship, and it is proved that she sailed on the voyage insured, and never arrived, and one of the plaintiff's witnesses testified that three or four days after the vessel sailed he had heard that she had foundered at sea, but that the crew were saved, it was held not to be incumbent on the plaintiff to call some of the crew, or to show that he had ineffectually endeavored to procure their attendance. *Koster v. Reed*, 6 B. & C. 19. So, if the ship is warranted free from capture and seizure, it is not incumbent on the plaintiff to prove that the loss did not happen by these perils, if the vessel has never been heard from, although the loss in the declaration is said to be by foundering at sea. *Green v. Brown*, 2 Stra. 1199. See also *Newby v. Read, Park, Ins.* 85.



the deviation and delay for repairs, are to be repaid by the insurers.<sup>1</sup>

If the vessel enters a port in the course of the voyage, and is there detained by winds, ice, or other causes which might under other circumstances be classed among perils of the sea, the whole cost of such delay and detention must be borne by the owner, if the voyage insured is afterwards performed.<sup>2</sup>

B. *When, and how far, Collision is a Peril of the Sea.*

The usual and common instances of collision are obviously produced by causes which are most certainly among the perils of the sea. They are the winds, waves, currents, or tides. And so far as these cause a collision there can be no question of the liability of the insurer.<sup>3</sup> But where the collision is caused only in part by the extraordinary violence or unexpected operation of the wind or water, and in part by the negligence of the master and the crew, the question may arise, how far the insurers are responsible. And this question would seem to be still more difficult, when there was no extraordinary or unusual action of wind or sea, and none which might not have been, and should not have been, anticipated and prepared for, and the collision took place because the master and crew were wholly wanting in skill or care. And it sometimes occurs that the collision is purposely caused by the master or crew, and is to be attributed exclusively to their intention and act.

The answer to these questions is, that, although the insurers do not insure the ship-owners against negligence on the part of the master and crew, yet, as we have already seen, they are liable for damage caused by a peril of the sea, though that peril be put into operation by the negligence of those in charge of the vessel.<sup>4</sup>

<sup>1</sup> Expenses of this nature are generally settled in this country by a general-average contribution, as we shall see *post*, in the chapter on General Average, where this subject is fully considered. See also *post*, tit. Partial Loss.

<sup>2</sup> *Everth v. Smith*, 2 M. & S. 278.

<sup>3</sup> See *Buller v. Fisher*, 3 Esp. 67.

<sup>4</sup> This was admitted by *Curtis, J.*, in

*General Mutual Ins. Co. v. Sherwood*, 14 How. 351; and cannot be disputed, if the present interpretation of the doctrine of *causa proxima non remota spectatur* be correct. See *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477, and other cases cited in this section, all of which admit that the underwriters are liable for the damage done to the vessel insured.

If the collision be caused entirely by the wilful act of the master and crew, we should say that the insurers were still liable, unless the circumstances were such as to give rise to the question of barratry. We know no direct authority upon the question, how far such an act would be barratrous. At one time it would, perhaps, have been necessary to prove, in order to make it barratry, that the motive of the act was one of hostility to the shipowner. We apprehend, however, that this would now be presumed, perhaps absolutely, from the act itself; and that insurers would not be liable for damages caused by a collision intentionally and maliciously, and without excuse or necessity, caused by the master and crew of the ship insured, unless there was insurance against barratry.<sup>1</sup>

C. *For what Effects of Collision Insurers are Answerable.*

The prevailing rule in this country and in Europe is, that the party in fault must suffer his own loss and compensate the other party for the loss that he may sustain. But if neither be in fault the loss rests where it falls. If both are substantially in fault, the loss also rests where it falls, by the rules of the common law, but is divided equally between the parties by the rules of the admiralty law.<sup>2</sup>

The qualifications to this rule, and the applications of it, belong, in some measure, to the Law of Shipping. But in the Law of Insurance, these rules have given rise to questions of great difficulty and importance.

If a vessel suffers from a collision without any fault on either side, or with mutual fault, it has no claim against the other, and is subject to no claim by the general law of shipping. And here the insurers simply pay for the damage sustained, deducting one third off, new for old.

If the vessel suffers from the fault of another vessel, she has a

<sup>1</sup> We are not aware that this precise question has arisen; but it would seem that in such a case, according to the authorities, the loss by collision would not be the proximate cause of the loss if superinduced by barratry, though it would if there had been no barratry, but merely negligence. See *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, cited *ante*, p. 534, n. 1.

<sup>2</sup> See *The Scioto*, Daveis, 359; *The Woodrop*, Sims, 2 Dods., 83; *Reeves v. Ship Constitution*, Gilpin, 579; *The Sappho*, 9 Jur. 560.

claim for compensation against the vessel in default; and the insurers are still liable for the loss,<sup>1</sup> but are subrogated to the rights of the insured, and so acquire their claim against the injuring vessel.

If the ship is injured by her own fault, and by the same fault and the same collision injures another, and is obliged to make compensation, the loss of the owner of the ship in default has two elements: one, the direct loss his ship sustains; the other, the loss he sustains by being obliged to pay for the injury which his vessel has caused.

For the first of these, the insurers are certainly liable. Whether they are for the other has been the subject of some litigation. In Massachusetts<sup>2</sup> and in New York<sup>3</sup> it has been held, that the insurers are liable for the whole loss, consisting of both of these items, because the whole loss is caused by collision, and that is a peril insured against. And in a recent case the Supreme Court of Massachusetts say, that the law of that Commonwealth, that insurers are liable for the amount paid for damages done by an insured vessel to another vessel by reason of collision, was settled on the most full and deliberate consideration, and has since then been reaffirmed,<sup>4</sup> and that the court see no good reason for reconsidering the question.<sup>5</sup> But by the Supreme Court of the United States,<sup>6</sup> reversing the decision of the Circuit Court,<sup>7</sup> and also by a judgment of the Court of Appeals of New York,<sup>8</sup> overruling a decision in the Supreme Court of that State,<sup>9</sup> it is now

<sup>1</sup> *Smith v. Scott*, 4 Taunt. 126. It was proved in this case, that the collision was caused by the grossest negligence on the part of the colliding vessel. It was argued, that the negligence was the cause of the loss; but *Mansfield*, C. J., said: "I do not know how to make this out not to be a peril of the sea. What drove *The Margaret* against *The Helena*? The sea. What was the cause that the crew of *The Margaret* did not prevent her from running against the other? Their gross and culpable negligence; but still the sea did the mischief."

<sup>2</sup> *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477. It was so held also by Mr. Justice

*Story*, in *Hale v. Washington Ins. Co.*, 2 Story, 176.

<sup>3</sup> *Matthews v. Howard Ins. Co.*, 13 Barb. 234.

<sup>4</sup> *Walker v. Boston Ins. Co.*, 14 Gray, 2.

<sup>5</sup> *Blanchard v. Equitable Ins. Co.*, 12 Allen, 388.

<sup>6</sup> *Gen. Mut. Ins. Co. v. Sherwood*, 14 How. 351.

<sup>7</sup> *Sherwood v. Gen. Mut. Ins. Co.*, 1 Blatchf. C. C. 251.

<sup>8</sup> *Matthews v. Howard Ins. Co.*, 1 Kern. 9.

<sup>9</sup> *Matthews v. Howard Ins. Co.*, 13 Barb. 234.

held, that the insurers are only liable for the damage sustained by the vessel insured, if the collision is caused by the fault of the officers and crew of that vessel, and are not liable for the compensation due from it for the injury inflicted upon the other vessel. The general reason for this decision is, that the insurers of the ship in default have not insured the owners of the ship injured,<sup>1</sup> nor have they insured the owners of the ship in fault against a mere indebtedness thrown on them by the default of their own servants. And, while the negligence or other default of persons employed by the insured may not be a good defence of the insurers against a claim for a loss, which is itself insured against, such negligence or default cannot be itself the foundation of a claim against the insurers.

<sup>1</sup> This point, though presented with great ability by the learned counsel for the defendants in the case of *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477, 480, does not appear to have been much relied on by the court in *General Mut. Ins. Co. v. Sherwood*, 14 How. 351. The argument is this: "A policy on a vessel insures that particular vessel. In fixing the amount of the premium and determining what sum shall be put at risk, the underwriter is materially influenced by the age, size, and strength of the vessel which is the subject of the policy. . . . But the claim made by the plaintiffs introduces into the contract another vessel, about which the underwriter had no means of obtaining any knowledge, but which he is nevertheless to stand as insurer of, against the peril of collision from negligence." The answer to this is, that there are many expenses and charges for which the underwriter of a ship is liable, which flow incidentally from a peril insured against, and are not a direct damage to the vessel; as where "a ship is insured against the perils of the sea, a part of the cargo is thrown overboard by reason of a peril of the sea, and the ship and

owner become at once chargeable for a proportion of this loss of the cargo, and the underwriter is held bound by the policy to indemnify the owner of the ship for the sum he has to pay to make up the loss of the cargo." 8 Cush. 492. But this hardly seems to meet the case. Suppose, for instance, that a house is insured against fire, and is burned by the negligence of the servants of the insured, and this fire communicates to an adjoining house, would it be pretended that the insurer was liable for the whole damage done to both houses, even though there should be a law compelling the owner of the house insured to pay the owner of the other house for the damage done by his servants?

It was also urged, on the part of the plaintiffs, that the collision diminished at once the value of the vessel insured by the amount which she would have to pay, since there was a lien on her to that amount. But this point was not relied on by the court, and we think it is a sufficient answer to it, to say, that there was not necessarily a lien *in rem*, as the owners of the injured vessel might have proceeded *in personam*.

The principle which governs this case is, that the proximate cause only is to be regarded, and the remote cause disregarded. And, while the law will hold the insurers of the ship in fault liable for the injury immediately caused to the insured by the negligence of their servants, it does not pursue the chain of effects, and hold these insurers liable to the owners for the money which a rule of admiralty, or of the law of shipping, requires them to pay to others for the damage their servants do them.<sup>1</sup>

<sup>1</sup> We consider that this question turns and depends for its solution altogether upon the interpretation to be given to the maxim, *causa proxima non remota spectatur*. We have already had occasion to consider this question, as to how far the underwriters are generally liable for a loss caused by the negligence of the servants of the assured (see *ante*, p. 534, n. 1), and shall therefore speak of the question here only so far as it is especially applicable to loss by collision, as we shall, in a subsequent section, have occasion again to refer to it, in considering the question, which peril is the proximate one, when a loss is occasioned by two or more causes, and only one is insured against. Mr. Justice *Curtis*, in *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 366, states the rule thus: "In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion the loss claimed, if it depended upon the cause of that peril, whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss." This rule, it will be per-

ceived, admits that the underwriters are liable for a loss by a peril, although that peril would have been safely encountered but for the negligence, and the rule is limited to the case where the peril would, of itself, have been insufficient to occasion a loss. That is, in the case at bar, the owners of the vessel insured would not have been liable for a loss by collision, unless that collision was caused by negligence on the part of their servants, and their only claim against the underwriters was founded on the fact of such negligence, as their liability was imposed upon them by that fact, and consequently the negligence was properly considered as the cause of the loss. The language of the court above cited is the subject of an able and elaborate criticism in *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477, 498, in which it is contended, that the negligence, though an element in the case, is not the proximate cause of the loss. *Fletcher, J.*, said: "The negligence cannot be set up as a distinct, substantive, proximate cause of the payment, upon any other ground than that the payment was a penalty for the negligence; and, if so, the penalty should be measured by the negligence, and exacted, even though there should be no damage from the collision. But surely there was no penalty to be measured by the negligence, but the payment of the actual carefully ascertained damage

We think that the decision of the Supreme Court of the United States rests upon the better reason, and a just application of indisputable principles. But a similar application of the same principles might require the court to abandon the ground formerly taken by them in another case. That was a case of collision in the river Elbe, whereby the vessel insured, without default, came into collision with another vessel. By a law of Hamburg, which governed the place where the collision took place, the loss, when there was no fault, was divided between the two ships; instead of resting where it fell, as it does by the common law and the law-merchant generally. Mr. Justice Story held, that the insurers of the ship were obliged to pay, not only for what she herself suffered, but for all the money awarded to the other ship by the law requiring a division of the loss.<sup>1</sup> And the Supreme Court unanimously affirmed his decision.<sup>2</sup>

Two years before the trial of this case before Mr. Justice Story, the very same question came before the King's Bench in England, Lord Denman presiding, in reference to a ship injured, without default, by collision in the river Hoogly, and compelled, by a similar law of Calcutta, to pay for a part of the injury sustained by the other vessel. The English court held, that this part of the loss was too remote; and that the insurers should pay only for the injury sustained by the vessel insured.<sup>3</sup>

We think this last a just decision; and we also think that the

caused by the collision, which is, of course, the proximate cause of the payment."

<sup>1</sup> *Peters v. Warren Ins. Co.*, 3 Sumner, 389.

<sup>2</sup> *Peters v. Warren Ins. Co.*, 14 Pet. 99.

<sup>3</sup> *De Vaux v. Salvador*, 4 A. & E. 420. The decision in this case was given by Lord Denman, C. J., who, in a letter to Mr. Charles Sumner, dated Sept. 29, 1840, published in 2 Story's Life and Letters, 379, said: "Your report of Judge Story's sentiments on our decision in *De Vaux v. Salvador* had not escaped my memory, and his now recorded judgment makes me regret that

we did not grant a rule to show cause, that a full discussion of the point might have been had. If it should arise again, the case of *Peters v. Warren Ins. Co.* will, at least, neutralize the effect of our decision, and induce any of our courts to consider the question as an open one." But in *Thompson v. Reynolds*, 7 Ellis & B. 172, 40 Eng. L. & Eq. 54, 57, where there was a special clause, providing that the underwriters should be liable in such a case, Lord Campbell, C. J. said: "It is quite clear, that it is only by virtue of this special clause, that such a claim as this can be sustained, and it must be limited by the terms of that clause."



same principles which were acknowledged and applied by the Supreme Court of the United States, in *General Mut. Ins. Co. v. Sherwood*,<sup>1</sup> and by the New York Court of Appeals in *Mathews v. Howard Ins. Co.*,<sup>2</sup> would lead directly and necessarily to the conclusion to which the English court came in *De Vaux v. Salvador*,<sup>3</sup> although a distinction has been pointed out between these cases.<sup>4</sup>

We have already had occasion to refer to the rule, *causa proxima non remota spectatur*, in other connections. It is a principle of frequent recurrence, not only in actions on policies of insurance, but elsewhere, and it is to be regretted that it should have been so imperfectly defined, or perhaps it would be better to say, that the principle is incapable of exact definition. Fifty years ago the question appeared, for the first time, we think, in marine insurance. An American ship was insured in London, "warranted free from American condemnation." She endeavored to escape from New York after the embargo had been declared; but, being cast ashore by wind and sea, was the next day seized, at great expense got off, and ultimately condemned. The court held that the condemnation

<sup>1</sup> 14 How. 351.

<sup>2</sup> 1 Kern. 9.

<sup>3</sup> 4 A. & E. 420.

<sup>4</sup> In *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, *Curtis, J.*, said: "It has been urged, that in the case of *The Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet. 99), this court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against." If, however, we apply the rule laid down by Mr. Justice *Curtis*, above referred to, it is evident, that the collision was but the remote cause of the loss, and the peculiar law of the country the proximate cause; for it is very certain that the collision itself imposed no liability upon the ship by

the general maritime law. The distinction above taken may be termed a metaphysical subtlety; but we think distinctions of this nature are justifiable, when the rule itself is but a metaphysical subtlety, since it declares that where the loss is occasioned by a peril superinduced by the barratry of the master of the vessel, or by the negligence of the owner himself, the underwriters are not liable, on the ground, that in the one case the barratry is the proximate cause of the loss, and in the other the negligence is the *causa sine qua non*, while in the case of a peril superinduced by the negligence of the master of the vessel, the negligence is considered as the remote cause of the loss. It may be remarked, also, that Mr. Justice *Story* considered the two cases as resting on the same basis, as shown by his decision in *Hale v. Washington Ins. Co.*, 2 Story, 176, which case was decided on the authority of *Peters v. Warren Ins. Co.*, 14 Pet. 99.

was the *proximate* cause of loss, and there could be no claim for the stranding by a sea peril, and even for a partial loss.<sup>1</sup> Very recently, an English ship, "warranted free from . . . . *all the consequences of hostilities*," was lost by stranding caused by the removal by the Rebel armies in the late war of a light on the coast of North Carolina. It might seem that this was "a consequence of hostilities"; but the English Common Pleas held that the loss by stranding (which was clearly a loss by a sea peril) was the proximate cause of the loss.<sup>2</sup> In an early American case, the Supreme Court of the United States say: "An effect which proceeds inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause."<sup>3</sup> If this be regarded as a definition of "the proximate cause," which alone is to be regarded in insurance cases, we should say that it was a more severe and strict definition than can be sustained by the weight of authority. Although, in a recent insurance case in Maine, the court adopt this definition and found their decision upon it. They say: "It would seem to follow (from this definition) that, to render the insurers liable, the peril insured against must be the sole proximate cause of the loss. . . . And the loss must be so dependent upon the peril, that it is not only the natural result, but is the necessary and inevitable effect of it." The court had previously said: "It is well settled that the rule *causa proxima non remota spectatus* is the one by which the insurer's liability must be ascertained. The difficulty lies not so much in the principle involved, as in its application."<sup>4</sup> A recent case in Pennsylvania applies this rule where the vessel was sunk through the negligence (as alleged) of the master and crew; and it was held that the loss by sinking was a loss by a peril of the sea, and was the proximate cause, binding the insurers, the loss by negligence being only the remote cause.<sup>5</sup> This question has frequently arisen in actions under fire policies; and it is often said in them, both by counsel and court, that the rule of proximate cause is equally applicable to insurances of all kinds. Of this we have no doubt. But there are cases, as that of Maine

<sup>1</sup> *Livie v. Johnson*, 8 East, 648.

<sup>4</sup> *Dyer v. Piscataqua Ins. Co.*, 53

<sup>2</sup> *Ionides v. Univer. Mar. Ins. Co.*, C. Maine, 118.  
B., N. S. 259. (E. C. L. R., vol.  
108.)

<sup>5</sup> *Phoenix Ins. Co. v. Cochran*, 51  
Penn. St. 143. There can be doubt

<sup>3</sup> *United States v. Hall*, 6 Cranch,  
171.

that this decision is in conformity with  
the decided weight of authority.

above spoken of, in which it would seem that the rule is applied with far more severity to contracts of insurance than to other contracts or liabilities. We see no adequate reason for this, and doubt whether such a rule would be found to rest upon the weight of authority.<sup>1</sup>

Policies of insurance often now settle this question, so far as collision is concerned, by providing that the underwriters shall be liable for such a loss.<sup>2</sup>

By statute in England ship-owners are now liable for loss of life and personal injury by negligent collision. For the amount paid under this statute, the insurers have been held under a clause, whereby the insurers in case the vessel should come into collision with any other, and the insured should become liable to pay any sum not exceeding the value of the ship and freight, agreed to be responsible.<sup>3</sup>

The liabilities of underwriters under this special clause, or under the law as now established in Massachusetts, must, of course, be limited to the amount which the insured owners were bound to pay under the statutes limiting their personal responsibility.

In a recent case in that State, it was contended that the insurer on the ship was only liable for what the ship-owner was obliged to pay as ship-owner, and not for what he had to pay as owner of the

<sup>1</sup> For an interesting case in which this question has quite recently been much considered, we refer to *Massden v. City & County Ins. Co.*, Eng. Law R. Part IV. 1866, p. 231.

<sup>2</sup> *Thompson v. Reynolds*, 7 Ellis & B. 172, 40 Eng. L. & Eq. 54. The policy in this case provided, that in case the ship should by accident, or through the negligence of the master and crew, run down or damage any other ship, and the assured should pay any sum not exceeding the value of the ship and her freight, in pursuance of the judgment of a court, or in pursuance of any award entered into by the assured with the concurrence of two of the directors of the company, the company should be liable for such proportion of three-fourth parts of the sum so paid, as the amount

insured should bear to the value of the ship insured and her freight. The ship was valued at £ 3,000 in the policy. Having come into collision with another vessel, she was libelled, and a decree passed that she should pay £ 2,110. This sum not being paid, the vessel was sold under a decree of the court, and the plaintiff claimed to recover the proportion for which the defendants were liable under the agreement, on the supposition that he had paid £ 3,000; but the court held the liability was to be proportioned to the sum which the plaintiff was actually obliged to pay, namely, £ 2,110.

<sup>3</sup> *Excelsior Co. v. Smith*, Court of Session, Scotland, 2 Law Times, N. S. 90.

freight. The court seem, however, to have considered the question as if the ship-owner had assigned the freight, in which case they said the assignee would not have been liable for the damage done by the collision, and therefore the whole damage would have to be paid by the ship-owner as such.<sup>1</sup>

#### SECTION IV. — *Of Losses from Fire.*

By the general Law of Shipping, fire is not a peril of the sea, as between the shipper of goods and the ship-owner, and we may suppose the same rule would apply to a case of insurance; but the question is not practically a very important one, as fire is always specifically insured against in the marine policies in common use. But the underwriters are not liable for a fire caused by the inherent defect or quality of the thing insured.<sup>2</sup> They have been held liable, where a vessel was burned by the public authorities, through the fear of contagious diseases.<sup>3</sup> The ship may be burned purposely by the master, and yet the insurers be held responsible, if this burning were the only means of saving her from capture by a public enemy; for, in the first place, the burning is then a duty owed to the state; and, in the second, the insurers are not damaged, because, if not lost by fire, she would have been lost by capture; but if loss by capture is expressly excepted, it would seem, from some authorities, that the first reason would be enough.<sup>4</sup>

<sup>1</sup> Walker v. Boston Ins. Co. 14 Gray, 288.

<sup>2</sup> Boyd v. Dubois, 3 Campb. 133.

<sup>3</sup> Emerigon, c. 12, s. 17, § 2 (Meredith's ed.), 348. See Pattison v. Mills, 1 Dow & C. 342, 2 Bligh, N. S. 519.

<sup>4</sup> Emerigon, c. 12, s. 17 (Meredith's ed.), 350, Valin, vol. 2, 75, tit. Ins. art. 26, and Pothier, Ins. n. 53, all agree that in such a case the underwriters are liable; and it has been so held by Lord Ellenborough, in Gordon v. Rimmington, 1 Campb. 123. Mr. Weskett, in his work on Insurance, tit. Fire, n. 6, is, however, of the opinion, that, unless the master was in danger of being killed by falling into the hands of the enemy, he would

not be justified in setting fire to the ship; and the reason he gives is a strong one, and worthy of careful attention. It is this: "Because, although she were captured, there would still remain a chance of her being retaken by cruisers of his own nation, or possibly by such part of her crew as might happen to be left on board of her." Mr. Phillips remarks that "this reason does not show that the insurers ought to be wholly exonerated from the loss; it only goes to show, at most, that what would be the net amount of the salvage in case of recapture ought to be deducted from the amount of a total loss, or else that the insurers ought to be answerable only

From analogous decisions in cases of land insurance against fire, it might be inferred that if property were injured or rendered worthless by the effects of a fire, but without actual ignition of that property, the insurers would not be answerable. But the true principles of the Law of Marine Insurance would lead to the conclusion, that if these destructive effects are the direct and immediate effects of an actual fire, the insurers should be held. We think the law, as deduced from the cases, may be expressed thus: If there is no ignition, insurers are not liable for the extraordinary effects of an ordinary fire; but they are liable for the ordinary effects of an extraordinary fire.<sup>1</sup>

for the amount to which the recaptors would be entitled for recovering the property, supposing the loss, in such a case, to be adjusted as an average." But this is not an entirely satisfactory answer to the objections to the law, as laid down by Lord *Ellenborough*, although it may be to the reason of Mr. *Weskett*. This last applies to the case where the insurers are liable for capture; but where the vessel is insured free from capture, it is difficult to see why the underwriters should be liable for the wilful act of the agent of the insured, that act being done to avoid a peril for which they would not be responsible.

<sup>1</sup> The rule is generally laid down, that there must be ignition or actual combustion to enable the insured to recover for a loss by fire. 2 Marsh. Ins. 790. The case cited in support of this proposition, and the leading one on the subject, is *Austin v. Drew*, 4 Campb. 360, Holt, N. P. 126, 6 Taunt. 436, 2 Marsh. R. 130. The insurance was "against all the damage which the plaintiffs should suffer by fire" on their "stock and utensils in their sugar-house." The evidence showed, that the building was of eight stories, and in each story sugar, in a certain state of preparation, was deposited for the pur-

pose of being refined, and that for this purpose a certain degree of heat was necessary. To accomplish this, there was a chimney running up through the whole building, forming almost one side of the house, with a register in it on each story, whereby more or less heat could be introduced at pleasure into the rooms. At the top of the chimney was a register, which was shut at night, in order that the heat might be retained in the building. The register was, by the negligence of a servant, left shut one morning when the fires were lighted, and, consequently, the smoke and heat were forced into the room where the sugars were drying, and damaged them to a great extent. It was held, that the insurers were not liable. This case has been cited as an authority for many positions. The most accurate report of it is in 4 Campb. 360, where *Gibbs, C. J.*, states the reasons for the decision, as follows: "In this case there was no fire, except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits?"

Probably the rules prevailing in land policies against fire, that the insurers are liable for expenses incurred in arresting and pre-

This is not a fire, within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney." Mr. Justice *Cushing*, after a thorough analysis of this case, in *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. 356, said: "This, therefore, and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of *Austin v. Drew*, namely, that where a chemist, artisan, or manufacturer employs fire as a chemical agent, or as an instrument of art or fabrication, and the article which is thus purposely subjected to the action of fire is damaged in the process by the unskilfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This, we apprehend, is good sense and sound law." And the learned judge further remarks: "It may well happen that serious damage within the scope of a fire policy shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantel-pieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition, that is, visible inflammation." This precise point, however, did not arise in the case. But in *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676, it was expressly held, that the insurers were liable for the damage done in such a case.

It seems well settled, on principle and authority, that underwriters are not liable for damage done by lightning, where there is no ignition, lightning not

being fire. *Kenniston v. Mer. Co. Mut. Ins. Co.*, 14 N. H. 341; *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637, 4 Comst. 326. Nor are they liable for damage done by the explosion of a steam-boiler. *Millaudon v. N. O. Ins. Co.*, 4 La. Ann. 15. So, where it was provided by the conditions annexed to a policy of insurance against fire, that the company should not be liable "for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specifically specified in the policy," the company was held not liable, where fire, which was directly and wholly occasioned by an explosion, was the proximate cause of the loss. *St. John v. Am. Mut. F. & M. Ins. Co.*, 1 Duer, 371, 1 Kern. 516. See also *Perrin v. Protection Ins. Co.*, 11 Ohio, 147; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. 427; *Roe v. Columbus Ins. Co.*, 17 Mo. 301; *McAllister v. Tenn. M. & F. Ins. Co.*, 17 Mo. 306.

But an explosion caused by gunpowder is a loss by fire. It was so held in *Scripture v. Lowell Mut. F. Ins. Co.*, 10 Cush. 356, after a learned and elaborate review of the authorities. The explosion was caused by the son of the tenant of the house putting a match to a barrel of gunpowder. The question is thus stated by Mr. Justice *Cushing*: "By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion, and in part of explosion. Is the *whole* damage covered by a policy insuring 'against loss or damage by fire'?" The court held that it was. The law is laid down as follows: "In the present case, there is no room for question concerning a



venting fire,<sup>1</sup> and to some extent — it may be uncertain how far — for injury sustained from such endeavors,<sup>2</sup> as where goods

series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic, instead of gunpowder; and, this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house." On page 363, the court said their opinion excluded "all damage by mere explosions, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion." But, on page 364, several cases are stated as seeming to fall within the general rule of holding the insurers liable, where an explosion takes place without combustion, but is,

nevertheless, the result of the action of fire, which would seem to render them liable for damage caused by the explosion of a steam-boiler. For other cases of explosion by gunpowder, see *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 225; *Grim v. Phoenix Co.*, 13 Johns. 451.

<sup>1</sup> Thus, if a building is blown up with gunpowder by the public authorities, in order to stop a conflagration, the underwriters against fire are liable. *City F. Ins. Co. v. Corlies*, 21 Wend. 367; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Pentz v. Receivers of Etna F. Ins. Co.*, 9 Paige, 568, 3 Edw. Ch. 341. In *Welles v. Boston Ins. Co.*, 6 Pick. 182, blankets were put upon a building by the insured with the approbation of the insurer, while a fire was raging in the neighborhood, and the building and its contents were thereby saved from destruction, but the blankets were rendered worthless. The insured, the owner of the goods, paid for the blankets, and brought this action against his insurers. The latter admitted their liability for a part of the amount estimated upon the proportion they had at risk upon the policy, taken in connection with the store, of which the plaintiff had a lease for a term of years, and the value of the stock over and above the sum insured upon it. And the court held that the underwriters were not liable for the whole value of the blankets, but only in the proportion named, and that the owners of other buildings, which were perhaps saved by the use of the blankets, were not obliged to contribute.

<sup>2</sup> It is not yet quite settled, on the authorities, how far the insurers are

are hurt by water from the engines,<sup>1</sup> would apply to marine insurance against fire; always, however, with the proviso, that the

liable for goods damaged or lost while being moved from a building, through apprehension of its being burned by a conflagration then raging, and for the expense of so moving them. In *Pennsylvania*, it was held that they were not liable where the fire at the time was four houses off. *Hillier v. Alleghany Ins. Co.*, 3 Barr, 470. In *Case v. Hartford F. Ins. Co.*, 13 Ill. 676, the policy contained the following clause: "In case of fire or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail to do so, this company shall not be held responsible to make good the loss and damage sustained in consequence of such neglect." The store of the plaintiff, though not on fire, was in immediate danger of catching; and the circumstances were such that a neglect to remove the goods would have been gross negligence on his part. It was held that he was entitled to recover for all damage done, and expenses incurred. And the existence of such a clause does not seem to impose any greater obligations on the assured than would exist without it. *Firem. Ins. Co. v. May*, 20 Ohio, 211. It seems very clear, that, if the house should be burnt after the goods were taken out, the insurers would be liable for all damage done and expenses incurred, and there is no sound reason why the same rule should not apply where the danger was such as to excite apprehension in the mind of a man of ordinary prudence. See *Beaumont on Ins.* 41. In *Webb v. Protection Ins. Co.*, 14 Mo. 3, the policy contained a clause exempting the com-

pany from loss by theft; or any loss or damage by fire which might happen in case of an invasion, insurrection, or riot, &c. It was held, that the two clauses were independent of each other, and that the company were not liable for a loss by theft, in case goods were removed to protect them from an ordinary fire, although the court were of opinion, that ordinarily the insurers would be liable for such a loss. In *Agnew v. Insurance Co.*, Dist. Ct. Philadelphia, 7 Am. Law Reg. 168, affirmed in *Indep. Mut. Ins. Co. v. Agnew*, 34 Penn. St. 96, and in *Tilton v. Hamilton Ins. Co.*, 1 Bosw. 367, the underwriter was held liable for a loss by theft, where the goods had been removed. See also *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637, 640, per *Pratt, J.*

<sup>1</sup> In *Case v. Hartford F. Ins. Co.*, 13 Ill. 676, 680, *Turnbull, J.*, said: "Surely an injury to the goods by water thrown to extinguish a fire would not be an injury to the goods by actual ignition, and yet no case can be found where an insurance against damage by fire has been held not to extend to such a case." See also *Hillier v. Alleghany Co. Mut. Ins. Co.*, 3 Barr, 470, per *Grier, J.*; *Agnew v. Insurance Co. Dist. Ct., Philadelphia*, 7 Am. Law Register, 168; *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637, per *Pratt, J.*; *Scripture v. Lowell Mut. F. Ins. Co.*, 10 Cush. 356, 365, per *Cushing, J.* In *Nimick v. Holmes*, 25 Penn. St. 366, it was held, that, where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam for the purpose of extinguishing the flames, and by tearing up part of the deck of the ves-

insurers are not to be held responsible for losses not specifically insured against, unless they are the direct and immediate effects or consequences of a peril which is insured against.

The risk does not cease on the ship or furniture, if during the voyage any part of it is taken on shore in the ordinary course of events.<sup>1</sup> But this rule does not apply to cargo which is taken on shore for the purposes of barter.<sup>2</sup>

#### SECTION V. — *Of Loss by Pirates, Robbers, or Thieves.*

THE usual insurance against these risks renders the insurers liable for losses or damage arising from all such acts as amount to piracy or robbery; even, it is said, if they are committed by the crew, provided due care and diligence have been used to prevent them; as if there be a mutiny of the crew.<sup>3</sup> To bring a loss within

sel, should be contributed for in general average. But there seems to be no reason why the insurer against fire should not be liable in such a case.

<sup>1</sup> In *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341, during the voyage, in accordance with a usage of trade, the sails were taken on shore while the vessel was being repaired, and were burnt, and it was held that the insurers were liable. So in *Brough v. Whitmore*, 4 T. R. 406, where provisions were lost under similar circumstances, the underwriter was held liable.

<sup>2</sup> In *Martin v. Salem Mar. Ins. Co.*, 2 Mass. 420, a vessel and cargo were insured "from Marblehead to one or more ports in the West Indies, for the purpose of selling the outward and purchasing a return cargo, and at and from thence to Marblehead." The outward cargo was landed and sold, and the proceeds, in the form of specie, with which the homeward cargo was to be bought, were in the hands of the factor there, according to the usage of the trade, when the house was burnt and most of the specie lost. Held, the risk did not continue

after the goods were landed. In *Harrison v. Ellis*, 7 Ellis & B. 465, a vessel and cargo were insured. The risk on the cargo was to continue till it should be discharged and safely landed. The policy also contained the memorandum: "With liberty to load, reload, exchange, sell, or barter, all or either, goods or property on the coast of Africa and African islands, and with any vessels, boats, factories, and canoes, and to transfer interest from this vessel to any other vessel, or from any other vessels to this vessel, in port or at sea, and at any ports, or places she might call at or proceed to, without being deemed a deviation." It was held, that the underwriters were not liable for a loss occasioned while part of the cargo was in a factory on the coast, and the vessel was engaged in loading native produce, by the factory and its contents being burned.

<sup>3</sup> It is so stated by Chancellor *Kent*, 3 Comm. 303, citing *Brown v. Smith*, 1 Dow, 349. Mr. *Phillips* says, citing the same case: "Under the risk of pirates and rovers, or under perils of the seas, the insurers are liable for losses by

the words of this clause, there must be violence, for without this there can be neither piracy nor robbery. But there may be theft without violence; and whether a loss by such theft would come within this clause is not certain from the decisions. But the weight of American authority, upon the whole, would lead to the conclusion that insurance against "theft," or against "thieves," would make the insurers liable for a loss by larceny.<sup>1</sup> To avoid this conclusion,

a mutiny of the crew." 1 Phillips, Ins. § 1106. Mr. Arnould, 2 vol. Ins. 817, says it seems the underwriters are liable in such a case, citing the same case, and adding: "In *Dixon v. Reid*, 5 B. & Ald. 597, such a loss was laid as loss by barratry, which seems the true mode of alleging it." An examination of the case of *Brown v. Smith* will show, as we think, that this question did not, and could not, arise. The insurance was against "barratry of the master and mariners and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship or any part thereof." It has not, therefore, been decided that mutiny is a piratical act. In *Naylor v. Palmer*, 8 Exch. 739, 22 Eng. L. & Eq. 573, insurance was effected on advances for the outfits, provisions, etc., of coolies, to be repaid upon the safe delivery of the emigrants at the port of destination in Peru. The insurance was against pirates, thieves, and all other the usual perils. On the voyage the coolies rose upon the crew, murdered part of them and the captain, took the ship, and sailed for land; on reaching which they left the ship and escaped. *Pollock, C. B.*, said: "The act of seizure of the ship, and taking it out of the possession of the master and crew, by the passengers, was either an act of piracy and theft, and so within the express words of the policy, or, if not of that quality, because it was not done *animo fu-*

*randi*, it was a seizure *ejusdem generis*, analogous to it, or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy." The case was affirmed in the Exchequer Chamber, *Palmer v. Naylor*, 10 Exch. 382, 26 Eng. L. & Eq. 455. In the case of *McCargo v. New Orleans Ins. Co.*, 10 Rob. La. 202, where a cargo of slaves rose and took possession of the vessel, it was contended that the underwriters were liable on the ground that the act was a piratical one. The point was not determined by the court, the underwriters being discharged by reason of insurrection being excepted against.

In *Nesbitt v. Lushington*, 4 T. R. 783, where a vessel laden with corn was forced by stress of weather into a harbor in Ireland, and a mob came on board, took the command of the ship, and weighed anchor, by which the vessel was driven on a reef of rocks where part of the cargo was lost, and the rest the mob compelled the captain to sell to them at about three fourths of the invoice price, Lord *Kenyon* expressed an opinion that there might have been a recovery as for a loss by pirates, if the corn had not been insured against particular average. See also, generally, *Dean v. Hornby*, 3 Ellis & B. 180, 24 Eng. L. & Eq. 85.

<sup>1</sup> It is laid down in all the early text-writers and authorities, that an insurer is not liable for losses by theft on board the vessel, on the ground that the mas-

the phrase "assailing thieves" is sometimes used; and this no doubt covers only theft, *ab extra*, with violence. The tortious

ter of the vessel is bound to take all the care of the goods in his power; and, when they are stolen while in the vessel, it is considered as proceeding from negligent custody, and not from accident. *Roccus*, note 42; *Emerigon*, c. 12, § 29 (*Meredith's ed.*), p. 419. In this country Chancellor *Kent* has followed the authorities above cited, 3 *Comm.* 303, and has been sustained by a decision in *Tennessee*, *Marshall v. Nashville Ins. Co.*, 1 *Humph.* 99, where part of the goods were alleged to be stolen by persons connected with the boat on which they were shipped, and it was held on demurrer that the assured could not recover. In New York, on the other hand, the underwriters were held liable for a loss by simple larceny, while the boat was at a wharf. *Atlantic Ins. Co. v. Storrow*, 5 *Paige*, 285. And in *Am. Ins. Co. v. Bryan*, 1 *Hill*, 25, 26, *Wend.* 563, it was held, both by the Supreme Court and by the Court of Errors, after most elaborate arguments, that the word "theft" did not necessarily mean only a stealing by violence, but would also include a simple larceny. The goods had been stolen while the vessel was on the voyage, but it could not be shown by whom, — whether by a passenger or by one of the crew.

In England, Mr. *Arnould* says of this case: "In this country it cannot be considered law." 2 *Arnould*, *Ins.* 818. In this assertion he is supported by all the early text-writers. Mr. *Park* says: "But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted; as thieves are a peril expressly insured against by the policy." *Park*, *Ins.* 31, citing *Harford v. Maynard*,

before Lord *Mansfield*, 1785. In *De Rothschild v. Royal Mail Steam Packet Co.*, 7 *Exch.* 734, 14 *Eng. L. & Eq.* 327, eleven boxes of gold-dust were delivered to the defendants at Panama to be delivered at the Bank of England. The bill of lading contained the following exceptions: "The act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of whatever nature or kind soever, excepted." The boxes arrived in safety at Southampton, but in the course of their transmission to London by railway one of the boxes was stolen without violence. The jury found that the defendants were guilty of negligence in the conveyance of the boxes to London, and that this negligence caused the loss. The defendants pleaded that they were exempted by reason of the exceptions of loss from "robbers" and "dangers of the roads." Judgment was given for the plaintiffs on grounds which would seem to modify to some extent the rule as previously laid down by the English authorities. *Pollock*, C. B., said: "In construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and, taking these into consideration, we cannot doubt that the meaning of the contract was, that the defendants were not to be liable for the loss of the gold-dust in instances where it was taken by force, by a *vis major* which they, the defendants, could not resist, but that they were to be liable

conversion and sale of insured property by a United States consul at a foreign port, under color of legal proceedings and a claim of right, are not a loss within this phrase.<sup>1</sup> And even if robbery or theft is not insured against, but loss occurs by them in consequence of an exposure to theft by shipwreck, or as the direct and immediate effect of any peril insured against, the insurers would be held liable for this.<sup>2</sup>

### SECTION VI. — *Of Loss by Barratry.*

WHAT barratry is has been much disputed, and may not be yet quite settled; but we hold it to be any wrongful act of the master, officers, or crew, done against the owner.<sup>3</sup> And any one who has

where it was pilfered from them, or taken by stealth. It is very unreasonable to suppose that the shippers of a very precious article, of which a large value is comprised in a very small space, which is capable of being easily abstracted by any person employed in carrying it, meant to exempt the persons to whom they gave the custody and care of it from all responsibility for theft committed by their crew, or others, against whom, presumably, they could guard by the exercise of reasonable care; but it is likely that they should agree to exempt them where the goods were taken by a force which they could not resist. The nature of the transaction shows clearly, therefore, that the word 'robbers' means, not 'thieves,' but robbers by force, to whom the term is more usually applied, although in common parlance it is often applied to every description of theft. It is explained also by the word with which it is associated, 'pirates,' who certainly take by force and not by stealth. We have no doubt, therefore, in this bill of lading, that this is the proper meaning of the word 'robbers,' and, this being so, the loss in this case was not by robbers."

<sup>1</sup> Paddock v. Commercial Ins. Co., 2 Allen, 93.

<sup>2</sup> Bondrett v. Hentigg, Holt, N. P. 149. The goods, in this case, were plundered after they were saved from the wreck, but before they came into the hands of the owners. Pothier, n. 55, says: "The loss of effects insured happening through pillage, in case of shipwreck, by wreckers and others, on the shore on which the waves have cast them, is a peril of the sea, to be borne by the insurers." Emerigon adopts this decision, c. 12, s. 29 (Meredith's ed.), 419.

In two old cases it is held that a loss by piracy is a loss by a peril of the sea, though piracy be not specifically insured against. Pickering v. Barclay, 2 Roll. Ab. 248, pl. 10; Barton v. Wolliford, Comb. 56. See Santerna De Ass. part 3, n. 61-65; Straccha, Glossa. 22, *passim*, where this question is discussed.

<sup>3</sup> Considerable discussion has arisen in regard to the meaning of this word. In very many of the cases it is defined to be a fraud, cheat, or trick on the part of the captain against the interest of the owners. See Knight v. Cambridge, 1 Stra. 581, 8 Mod. 230, 2 Ld. Raym. 1349; Phyn v. Royal Exch. Ass.



an interest in the ship, cargo, or freight may insure that interest against barratry.<sup>1</sup>

If an unlawful act be done without intention, or through inadvertence or ignorance, it is not barratry.<sup>2</sup> The act must be wrongful in itself, and wrongfully intended; for if it be done in compliance with the owner's instructions or request, or with his assent, it is not barratry, even as against others who are injured by it.<sup>3</sup> But an intention adverse to the owner is not essential to barratry; for if the master or mariners violate any law in the belief that it will be for the owner's advantage, but without his instruction or request, this may be barratry, because such an act is a wrong against the owner, inasmuch as the master had no right to infer that the owner would desire or assent to a violation of law, even if it might be for his benefit.<sup>4</sup> Generally, however, if an act is done for the benefit of the owners, although through a mista-

Co., 7 T. R. 505; *Stamma v. Brown*, 2 Stra. 1173; *Lockyer v. Offley*, 1 T. R. 252; *Vallejo v. Wheeler*, Cowp. 143; *Wilcocks v. Union Ins. Co.*, 2 Binn, 574; *Earle v. Rowcroft*, 8 East, 126; *Wiggin v. Amory*, 14 Mass. 1; *Stone v. National Ins. Co.*, 19 Pick. 34; *Crousillat v. Ball*, 4 Dallas, 294. In *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, many of those cases were examined by Mr. Justice *Johnston*, and the points on which they turned were shown not to warrant the language used. The learned judge seemed to prefer the very excellent definition given by Emerigon, which he translated, "acting without due fidelity to the owners."

<sup>1</sup> *Stone v. National Ins. Co.*, 19 Pick. 34. The mate in this case insured his adventure against barratry of the master and mariners, and recovered for a loss occasioned by the theft of the crew.

<sup>2</sup> As the unintended violation of a blockade. *Dederer v. Delaware Ins. Co.*, 2 Wash. C. C. 61. In one case, a vessel having sprung a leak, the captain put into port, and, before a survey, broke up her ceiling and end bows with crow-

bars, in consequence of which the ship was much injured and weakened. It was suggested that this was done to procure the condemnation of the vessel. Lord *Ellenborough* said: "In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case now stands, there is a whole ocean between you and barratry." *Todd v. Ritchie*, 1 Stark. 240. And if a neutral vessel is captured and sent in for condemnation, and the crew desert, such desertion is not barratry on their part. *Messonier v. Union Ins. Co.*, 1 Nott & M'C. 155.

<sup>3</sup> *Nutt v. Bourdieu*, 1 T. R. 323. In *Thurston v. Col. Ins. Co.*, 3 Caines, 89, it was held that if an assured be apprised by his master of his pursuing another voyage than that insured, and does not disapprove of it, it is only a deviation and not barratry, though the master ultimately runs away with the ship, sells her, and embezzles the proceeds. See also *Ward v. Wood*, 13 Mass. 39; *Everth v. Hannan*, 6 Taunt. 375.

<sup>4</sup> *Earle v. Rowcroft*, 8 East, 126.

ken idea on the part of the master, it is not barratry.<sup>1</sup> But if a master undergoes any extraordinary and evitable peril, from no necessity whatever, but in the belief that it may be advantageous to his owner, a loss arising from this risk will be a loss by barratry.

So if the act were done by the master for his private and personal benefit.<sup>2</sup> And the extreme violation of duty, or gross negligence, might be barratrous, although committed without fraud or intentional wrong, and with no purpose of personal gain, and with no desire to injure any one.<sup>3</sup> And it is said that mere non-

<sup>1</sup> In *Dederer v. Delaware Ins. Co.*, 2 Wash. C. C. 61, an American vessel was captured by an English frigate on the ground that war had been, or soon would be, declared between the countries to which the vessels respectively belonged. The captain, apprehending the loss of the vessel, and all he had on board, and that he would be imprisoned, made an attempt to rescue the vessel, and failed. This attempt was the cause of the condemnation. The court held that if he acted for the benefit of his owners, his act would not be barratrous, otherwise if he acted for his own good exclusively. See also *Crousillat v. Ball*, 4 Dall. 294. In *Hood v. Nesbitt*, 2 Dall. 137, 1 Yeates, 114, a deviation to rescue a vessel which had been run away with was held not to be barratrous; the captain intending to give the reward to his owners. See also *Elton v. Brogden*, 2 Stra. 1264.

<sup>2</sup> As where the captain deviated for a private purpose of his own. *Ross v. Hunter*, 4 T. R. 33; *Vallejo v. Wheeler*, Cowp. 143, Loft, 631. See *Dederer v. Delaware Ins. Co.*, 2 Wash. C. C. 61, n. 3, *ante*; *Roscow v. Corson*, 8 Taunt. 684. In *Kendrick v. Delafield*, 2 Caines, 67, it was held, that, if a loss is shown to have taken place by the fraudulent act of the master, the presumption is that he did it for his own benefit, and in the

absence of proof to the contrary the plaintiff may recover, although the act was the boring of holes in the vessel.

<sup>3</sup> In *Heyman v. Parish*, 2 Campb. 149, the pilot testified that the captain sailed with a foul wind, contrary to his directions, and that, the ship having been stopped when going on shore by getting out an anchor, the captain cut the cable and allowed her to drift upon the rocks. *Park*, for the defendant, suggested that there did not appear to be any fraud. Lord *Ellenborough* said: "This is not necessary. It has been solemnly decided, that a gross malversation by the captain in his office is barratrous," referring to *Earle v. Rowcroft*, 8 East, 126. So "if the master, knowing the inevitable danger of capture if he proceed on his voyage, should, notwithstanding, continue it, and expose the vessel to certain seizure, this will be a loss, not arising from the perils insured against, but from a criminal breach of the duty he owes to his owners, which is barratry." Per *Parsons*, C. J., in *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102, 117, 121. So barratrously carrying a cargo into a blockaded port. *Goldschmidt v. Whitmore*, 3 Taunt. 508; *Calhoun v. Ins. Co. of Penn.*, 1 Binn. 293, 321. See *Vos v. United Ins. Co.*, 2 Johns. Ca. 180. And cruising and taking a prize contrary to instructions

feasance, as not resisting or preventing an injury to the property when this might have been done, may be barratrous.<sup>1</sup> It has been held that the sale of any part of the tackle, apparel or furniture, outfits or supplies, of a whaling ship by the master, in order to obtain money for his own use, or the conversion of money furnished by the owners for the purchase of refreshments or supplies, was an act of barratry. And the damage sustained by the vessel while lying in port disabled on account of such acts was compensated for, as was also the expense of sending the vessel home; but no allowance was made for demurrage or damage arising from

is barratry, although the captain labelled the prize for the benefit of his owner as well as himself. *Moss v. Byrom*, 6 T. R. 379. But see *Wiggin v. Amory*, 14 Mass. 1. Collusion by the captain to have his ship captured, is barratry. *Arcangelo v. Thompson*, 2 Campb. 620. So, if the ship and cargo are taken out of their course and fraudulently sold. *Dixon v. Reid*, 5 B. & Ald. 597, 1 D. & R. 207; *Jones v. Nicholson*, 10 Exch. 28, 26 Eng. L. & Eq. 542. Or wilfully running the ship on shore without necessity. *Soares v. Thornton*, 7 Taunt. 627. But if a master should run the vessel on shore, or cut away his masts, with a *bona fide* intention of saving the ship and cargo, this would not be an act of barratry, although it should turn out that the sacrifice need not have been made. Smuggling is barratry. *Vallejo v. Wheeler*, Cowp. 143; *Am. Ins. Co. v. Dunham*, 12 Wend. 463, 15 Ib. 9; *Mariatigui v. Louisiana Ins. Co.*, 8 La. 65; *Lockyer v. Offley*, 1 T. R. 252. In *Brown v. Union Ins. Co.*, 5 Day, 1, resistance to search, and rescuing and retaking a vessel, were held to be barratrous acts. See also *Wilcocks v. Union Ins. Co.*, 2 Binn. 574. So, if the captain should sail out of port without leave, in breach of an embargo, in con-

sequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, such an act would probably be held to be barratrous. Per Lord *Ellenborough*, C. J., in *Earle v. Rowcroft*, 8 East, 126, 138, citing *Robertson v. Ewer*, 1 T. R. 127.

<sup>1</sup> In *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 234, Mr. Justice *Johnson* said: "Certainly a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *prima facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So, if in [the] height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to, and otherwise preparing her to overcome the peril, it will be left to a jury to determine if such conduct be not barratrous." And a neglect to pay port duties before the ship sailed has been held to be barratry. See *Knight v. Cambridge*, 1 Stra. 581, 8 Mod. 230, 2 Ld. Raym. 1349. In the different reports of this case, the nature of the barratrous act is not stated; but in *Vallejo v. Wheeler*, Cowp. 143, it is said to have been the neglect to pay duties.

the delay of the vessel.<sup>1</sup> And barratry has been extended so far as to apply to carriers by land as well as by water.<sup>2</sup> If the policy excepts, or if the insured warrants against barratry, it would probably be construed only as an assuming by the insured of the risk of barratry; if, therefore, an act of barratry took place, the insurers would not be liable; but they would not be discharged from further responsibility, for the warranty against barratry would be held to mean only that the insured could make no claim because of it.

A deviation may not be barratrous, and generally is not;<sup>3</sup> but if the deviation be barratrous, and the insurers insure against barratry, then the act operates, not as a deviation, but as barratry. That is, the insurers would be liable for a loss caused by it; and would also be liable for a subsequent and independent loss; because this deviation, being an act of barratry and so insured against, would not discharge them.<sup>4</sup>

A stipulation that the underwriters shall not be liable for seizure or detention on account of illicit or prohibited trade does not render them less responsible for a seizure occasioned by barratry, if they insure against it.<sup>5</sup> So, also, as to a warranty of neutrality.<sup>6</sup>

<sup>1</sup> *Lawton v. Sun Mutual Ins. Co.*, 2 Cush. 500.

<sup>2</sup> *Boehm v. Combe*, 2 M. & S. 172.

<sup>3</sup> *Phyn v. Royal Exch. Ass. Co.*, 7 T. R. 505; *Thurston v. Col. Ins. Co.*, 3 Caines, 89; *Wiggin v. Amory*, 14 Mass. 1. So, where the captain deviated by reason of a misunderstanding of his instructions. *Bottomley v. Bovill*, 5 B. & C. 210, 7 D. & R. 702. In *Stamma v. Brown*, 2 Stra. 1173, the vessel was advertised to be going to Marseilles, and a bill of lading, signed by the master to go there direct, was given to the plaintiff, who thereon insured his goods. Before the ship sailed she was advertised to go to Genoa, Leghorn, and Naples, and the plaintiff's agent was told that it was intended to go to these ports first, and then to come back to Marseilles. He however insisted that the vessel should go direct. The chief justice

charged the jury that this, being against the express agreement to go first to Marseilles, seemed to be more than a common deviation, being a formed design to deceive the contractor; but on the jury asking whether, if the master was to have no benefit by his act, but went only to the other ports first for the benefit of the owners, that would be barratry, the chief justice said no, and a verdict was found for the defendant. It is not barratry for the master to omit to make practicable repairs, or to transship the cargo, unless in so acting his purpose was to injure his owners. *Stewart v. Tennessee M. & F. Ins. Co.*, 1 Humph. 242.

<sup>4</sup> See *ante*, p. 565, n. 4.

<sup>5</sup> *Am. Ins. Co. v. Dunham*, 12 Wend. 463, 15 Ib. 9; *Suckley v. Delafield*, 2 Caines, 222; *Calhoun v. Ins. Co. of Penn.*, 1 Binn. 293.

<sup>6</sup> *Wilcocks v. Union Ins. Co.*, 2 Binn.

It is said that a barratrous act must be done without the owner's assent; and this rule extends to all *quasi* owners, or to those who have the vessel for the time under their control and government as owners usually have. And if owners, or *quasi* owners, are themselves in default, in not preventing an act which would be barratrous, this is equivalent to their assent.<sup>1</sup> So, if the master is the sole owner of the ship, he cannot commit barratry against other parties in interest as shippers of goods,<sup>2</sup> or as charterers.<sup>3</sup> But it seems that a captain who is a part owner may commit barratry against his other part owners, and also against a charterer.<sup>4</sup>

If the insurer wishes to avail himself of the fact that the

574, 579; *Brown v. Union Ins. Co.*, 5 Day, 1. And where the ship was insured in any lawful trade, it was held, that the underwriters were liable for a loss which happened by the barratry of the master by smuggling, the words "lawful trade" being considered to mean the trade in which the ship was sent by the owners. *Havelock v. Hancill*, 3 T. R. 277.

<sup>1</sup> *Pipon v. Cope*, 1 Campb. 434.

<sup>2</sup> *Taggard v. Loring*, 16 Mass. 336; *Lewen v. Suasso*, Postleth. Dict. art. Assurance, 147; *Barry v. La. Ins. Co.*, 11 Mart. La. 630.

<sup>3</sup> *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39.

<sup>4</sup> *Jones v. Nicholson*, 10 Exch. 28, 26 Eng. L. & Eq. 542. The vessel in this case was owned by two brothers, one of whom sailed as captain. A charter-party was entered into with the defendant, and the goods shipped in pursuance thereof were insured by the plaintiff. The captain ran away with the vessel and goods, and the plaintiff paid the loss, on the supposition that the vessel had been lost at sea, but on ascertaining the facts in the case brought an action against the charterer to recover back the money paid, on the

ground that he was not liable for the barratry of the master, he being an owner; but the court held that the action could not be maintained. *Alderson*, B., said, that "a sole owner cannot commit barratry, but a part owner may. If it be not barratry, it may be within the other words of the policy." *Platt*, B., said: "The loss was consequent on an act of knavery by the captain; and is not that a fraud upon the other owners, who have separate rights to their several shares?" *Martin*, B., was of opinion, that the loss was within the general terms of the policy. This case was decided in 1855. The question came up in Scotland, in 1839, in the case of *Strong v. Martin*, 1 Dunl. Bell, & Mur. Sess. Cas. 1245. The vessel was owned by two persons as part owners. One of them acted as captain, and committed the alleged act of barratry. The court having desired the opinion of English counsel, that of Sir William Follett was obtained, and, in accordance therewith, the innocent part owner was held entitled to recover to the amount of his interest. But in *Wilson v. Gen. Mut. Ins. Co.*, 12 Cush. 360, in 1853, this point was decided the other way.

owner was master, he must prove it; and it is not necessary for the insured to prove negatively that he was not the owner.<sup>1</sup>

If the master has an equitable title to the vessel, he cannot commit barratry.<sup>2</sup> But a fraudulent title will not prevent his acts from being barratrous.<sup>3</sup> Nor can the master commit barratry, except as master, and no acts of his as supercargo, consignee, or factor would be barratrous.<sup>4</sup> But, if the owner of the ship be insured, the consent or request of the charterer to the act committed by the master will not prevent it from being barratrous;<sup>5</sup> and, on the other hand, if a charterer of a ship sails her and becomes a *quasi* owner, the master being appointed by the owner, an act by the master which would otherwise be barratrous against the charterer is not prevented from being so by the assent or request of the owner.<sup>6</sup>

As the master is, for many purposes, the agent of the owner,

<sup>1</sup> *Ross v. Hunter*, 4 T. R. 33; *Steinbach v. Ogden*, 3 Caines, 1; *Barry v. La. Ins. Co.*, 11 Mart. La. 202.

<sup>2</sup> *Barry v. La. Ins. Co.*, 11 Mart. La. 630.

<sup>3</sup> *Steinbach v. Ogden*, 3 Caines, 1. In this case, the master ran away with the vessel, procured a fraudulent survey and sale, and became the purchaser. He then entered into a contract of affreightment with the plaintiff, who acted in good faith, and had the goods insured by the defendant. The captain barratrously disposed of these goods, and the insurer was held liable.

<sup>4</sup> *Emerigon*, ch. 12, § 3 (*Meredith's* ed.), 296. But if the act is done by the master in his capacity of master, although he may fill other offices, it will be barratry. *Kendrick v. Delafield*, 2 Caines, 67. In *Cook v. Comm. Ins. Co.*, 11 Johns. 40, the ship and cargo were owned by the same person. The master was also supercargo and consignee, and the barratrous act complained of was the conversion of part of the cargo to his own use, after the vessel had arrived at her port of destination. The

underwriters were held liable, it being considered that the breach of duty was imputable to him as master. See also, on this point, *Earle v. Rowcroft*, 8 East, 126, 140.

<sup>5</sup> *Boutflower v. Wilmer*, 2 Selw. N. P. 969; *M'Intire v. Bowne*, 1 Johns. 229.

<sup>6</sup> *Vallejo v. Wheeler*, Cowp. 143, Lofft, 631, 1 Johns. 235, note; *Soares v. Thornton*, 7 Taunt. 627. It is a question of much interest in what cases the captain will be considered the agent of the general owners, and when of the special. In a case before Lord *Ellenborough*, *Hobbs v. Hannam*, 3 Campb. 93, it was held, that, where a ship was chartered and the general owner insured his interest, the underwriters were not liable to him for a barratrous act of the master appointed by the charterer. It has also been decided, that if the charterer sails the vessel as captain, he cannot commit an act of barratry against a shipper of goods. *Hallet v. Col. Ins. Co.*, 8 Johns. 272; *Taggard v. Loring*, 16 Mass. 336.



and is appointed by him, many policies provide that they do not insure against barratry, if the insured be owner of the ship.<sup>1</sup> Such a provision, of course, generally limits the insurance against barratry to a loss or damage to the cargo, and to such cargo only as is shipped by a party who is not an owner of the ship.<sup>2</sup> And the intention is, not to insure an owner against the misconduct of a person selected and appointed by himself. But if one who hired by charter the whole burden of the ship put on board his own goods, and received goods on board of other persons, and insured his interest in the freight, this provision or exclusion would not prevent his recovering from the insurers indemnity for a loss caused by the barratry of the master appointed by the owner.

The owner and his master are always required to guard, with all diligence, against the misconduct of the crew; and for their misdeeds, if such diligence be wanting, the insurers are not liable;<sup>3</sup> but, where all proper care and diligence are used, the insurers are responsible for losses caused by the barratrous acts of any of the officers or crew.<sup>4</sup> And insurance against the barratry

<sup>1</sup> In *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596, there was insurance against barratry of the master, unless the insured were owner of the vessel. The plaintiffs effected an insurance on the freight, which the owner of the vessel had assigned to them as security for advances in their own names, for the benefit of whom it might concern. It was alleged, that the insurance was effected for their benefit to the amount of their claim, and for the owner for the surplus. The court held, that, admitting this to be true, yet the policy being indivisible, and the barratry of the master being a good defence against one of the parties interested, it was good against all. And they were also of the opinion, that all the evidence construed together justified the conclusion that the policy was intended to cover the owner's interest, and to be held by the assured as security under an assignment, and that the owner was

therefore to be regarded as the assured, and the nominal assured as assignees merely, taking only the rights which the owner possessed, and liable for the barratrous acts of the master.

<sup>2</sup> *Brown v. Union Ins. Co.*, 5 Day, 1.

<sup>3</sup> *Pipon v. Cope*, 1 Campb. 434.

<sup>4</sup> The case of *Elton v. Brogden*, 2 Stra. 1264, is an important one on this point, and has been the subject of much criticism. The vessel was insured from Bristol to Newfoundland with a letter of marque. On the way she took a prize, and returned to England. Another policy was then made out, and the ship sailed with express orders from the owners, that if another prize was taken it should be sent back, but that the vessel should proceed on her voyage. Another prize was taken, and the captain gave orders to some of his crew to carry it to Bristol, intending to proceed to Newfoundland in his own vessel, but the crew compelled him to submit and

of the master and crew includes larcenies and embezzlements of the goods insured, by either the master or any of the crew, excepting only petty thefts and the like.<sup>1</sup>

It is said that if the barratrous acts are committed while the person committing them is insane, the underwriters would not be liable, although the insanity was brought on by the excessive use of intoxicating liquors; but, if these acts were the result of intoxication caused in the ordinary way by voluntary and excessive indulgence in ardent spirits, the existence of such intoxication would not excuse or qualify them, and they would be considered as barratrous.<sup>2</sup>

return, and on the way his vessel was captured. The defence was that the insurers were discharged, on the ground of a deviation; but the court held, that this was excused by the force upon the master, and therefore was justified on the ground of necessity. The report then goes on to say: "The plaintiff's counsel would have made barratry of it, but the chief justice thought it did not amount to that, as the ship was not run away with in order to defraud the owners." In an appeal from the East Indies, heard before the Lords of the Privy Council, at the Cockpit, Sir *R. P. Arden*, Master of the Rolls, in observing upon the above case, said he thought it must be ill reported in *Strange*, for, upon the facts stated, there could be no doubt but that the mariners had committed barratry, and he was inclined to think that the policy must have been special, and did not include barratry of the mariners. *De Frise v. Stephens*, 2 Marsh. Ins. 521, note, Park, Ins. 116, note. Such seems also to have been the opinion of Lord *Mansfield* in *Vallejo v. Wheeler*, Cowp. 143. In *Scott v. Thompson*, 4 B. & P. 181, 186, Sir James *Mansfield*, C. J., was of the opinion that the act of the crew did not amount to barratry. Mr. Park says that the policy could hardly

have been a special one, as it would then have been absurd for the plaintiff's counsel to argue that it was barratrous. And, we may further remark, that if the policy was special, not insuring against barratry, and "defendant's counsel" be inserted in the place of "plaintiff's counsel," the decision then would be, that the act of the crew was not barratrous, being done for the benefit of the owners, as is stated in the report; for we take the law to be, that, if there is no insurance against barratry, the underwriters are not liable for a deviation caused by barratry. So that, whether the policy were special or not, we think, can make no difference.

In *Toulmin v. Anderson*, 1 Taunt. 227, the crew, aided by some prisoners of war on board, rose, seized the ship, and run her ashore. It was held, that the plaintiff would have been entitled to recover on these facts, on the ground of barratry, but, the voyage being illegal, the plaintiffs were non-suited. See *Toulmin v. Inglis*, 1 Campb. 421; *Brown v. Smith*, 1 Dow, 349.

<sup>1</sup> *Am. Ins. Co. v. Bryan*, 26 Wend. 563; *Stone v. National Ins. Co.*, 19 Pick. 34.

<sup>2</sup> *Lawton v. Sun Mutual Ins. Co.*, 2 Cush. 500.

In a case where it was alleged that the captain barratrously returned to port, procured the condemnation of the ship, and sold her and afterwards delivered her up to the purchasers, and the condemnation was more than six years before the commencement of the action, but the sale and delivery were within the six years, Lord Ellenborough was of the opinion that the cause of action did not accrue till the master had divested himself of the possession of the ship by delivering her up to the purchasers.<sup>1</sup>

SECTION VII. — *Of Loss by Capture, Arrest, Detention, or Restraint.*

THE usual phrase is, "against all captures at sea, or arrests, restraints, or detentions, of all kings, princes, and people." This covers captures, detentions, or arrests by public enemies,<sup>2</sup> by belligerents,<sup>3</sup> or by the government of which the assured is himself a subject,<sup>4</sup> if not for a breach of law.

In all these cases the word "capture" seems to be limited in its meaning to the taking of ships or vessels, as belligerent, and engaged in lawful war, or else to their forcible seizure by the acts of governments. Text-writers on the subject of insurance, American or foreign, often intimate that the word "capture," which literally means a taking, signifies in insurance law a taking or seizure by any persons whomsoever, and in any way whatsoever. If this be so, a vessel is lost by capture if taken and destroyed by pirates. We think this has not been the prevailing, and certainly

<sup>1</sup> Hibbert v. Martin, 1 Campb. 538.

Cranch, 29; Powell v. Hyde, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44; Olivera v. Union Ins. Co., 3 Wheat. 183; Rotch v. Edie, 6 T. R. 413.

<sup>2</sup> In Levy v. Merrill, 4 Greenl. 180, insurance was effected against the "risks contained in all regular policies of insurance," and the policy further declared, that, in case of difficulty arising concerning the adjustment of a loss, it should be settled according to the rules established at Lloyd's in London, or at the regular insurance offices in the United States. It was held, that loss by capture was a peril insured against.

<sup>4</sup> As an embargo. Odlin v. Ins. Co. of Penn., 2 Wash. C. C. 312; Lorent v. S. Car. Ins. Co., 1 Nott & McC. 505; M'Bride v. Mar. Ins. Co., 5 Johns. 299; Walden v. Phoenix Ins. Co., Ib. 310; Ogden v. N. Y. Fire Ins. Co., 10 Johns. 177, 12 Ib. 25; Page v. Thompson, Park, Ins. 109, n. See also Flindt v. Scott, 5 Taunt. 674; Anthony v. Moline, Ib. 711; Schnakoneg v. Andrews, Ib. 716; Bazett v. Meyer, Ib. 824.

<sup>3</sup> Lee v. Boardman, 3 Mass. 238; Rhinelander v. Ins. Co. of Penn., 4

not the commonly understood, meaning of the word. The word "capture," now in use by us, was formerly in English policies, and indeed is quite frequently now, replaced by "taking." A common form of insurance in England is against "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality whatsoever." It is impossible to give to the word "people" a wider meaning than is given to it by these words. If a seizure (which becomes a capture, if it be intended to take from the owner the property seized)<sup>1</sup> is made by any persons in any way, they must be people of some condition or quality. Nevertheless "people" in this clause has been judicially defined as meaning "the supreme power, the power of the country whatever it may be."<sup>2</sup> And the word "pirates"

<sup>1</sup> In *Black v. Mar. Ins. Co.*, 11 Johns. 287, there was a policy of insurance upon a ship from New York to Bremen, or a port of discharge in the North Sea or Baltic, against capture only. The policy contained, among others, the following warranty: "Also free from seizure in any port or place under the jurisdiction of Napoleon, or under the jurisdiction of any power under his control or in alliance with him." The ship was taken on the coast of Holland by two French privateers, and carried into the port of Amsterdam, and was afterwards condemned by the imperial council of prizes at Paris as prize of war. The jury found that the capture was within the jurisdiction of Holland, and that Holland was, at the time, in alliance with, or under the control or jurisdiction of, Napoleon. It was held to be a seizure within the warranty. The court said: "Seizure may, in general, be applicable to a taking or detention, for the violation of some municipal regulation; but where such meaning cannot be given to it, consistent with the obvious sense and understanding of the parties, it is no violation of any settled rule or principle of law to give it some other

interpretation, better comports with the fair intention of the parties. The underwriters did not mean to assume any risk except that of capture, and not even that, if made in any river, port, or place under the jurisdiction of Napoleon, or under the jurisdiction of any power under his control, or in alliance with him. It is no strained interpretation of the term 'seizure' to consider it as synonymous with 'capture'; and then the underwriters, although they assume the risk of capture generally, exempt themselves even from that risk, if the capture is made under any of the circumstances mentioned in the warranty. In no other way can any rational interpretation be given to the clause; and the jury having found that the seizure or capture was, in fact, within the exception as to place, the underwriters cannot be made responsible for the loss."

<sup>2</sup> *Nesbitt v. Lushington*, 4 T. R. 783. In this case a ship was forced by stress of weather into Elly Harbor in Ireland. There being a great scarcity of corn there at that time, the people came on board and took the control of the ship from the captain and crew by force,

becomes useless so far as seizure is concerned if the word "people" includes them. But in the case just referred to, where a cargo of corn was destroyed by a mob, it was held that this loss did not come under the word "people," but under the insurance against "pirates, rogues, and thieves." Marshall says: "Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, *or by a pirate*, and with intent to deprive the owner of it."<sup>1</sup> He then distinguishes between lawful capture and unlawful capture, and adds: "In general, for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable, the words of the policy being sufficiently comprehensive to include, and a warranty 'free from capture or seizure' to exclude, every species of capture to which ships at sea can ever be exposed." Phillips adopts and repeats this language.<sup>2</sup> Arnould seems to imply as much, for he says: "Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise."<sup>3</sup> But its legality or illegality does not affect the liability of the underwriter as against the insured. Whether lawful or unlawful, or however made, capture, when the proximate cause of loss, renders the underwriter liable, under a

and weighed her anchor, by which she drove on a reef of rocks, where she was stranded. They compelled the captain to sell all the corn on board, except about ten tons, at a certain price, which was about three fourths of the invoice price. The ten tons were lost in consequence of the stranding, by which it was damaged, and was obliged to be thrown overboard. It was held that the underwriters were not liable on a count stating the loss to be by a seizure by people to the plaintiffs unknown. Lord *Kenyon*, C. J., said: "That which happened in this case does not fall within the meaning of 'arrests, restraints, and detainments of kings, princes, and people.' The meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis*; it means 'the ruling power of the country.'" And Mr. Justice *Buller* re-

marked: "Neither can I agree with the construction put at the bar upon the word 'people'; it means 'the supreme power,' 'the power of the country,' whatever it be. This appears clear from another part of the policy; for, where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves'; then, having stated all the individual persons against whose acts they engage, they mention other risks, — those occasioned by the acts of 'kings, princes, and people of what nation, condition, or quality soever.' Those words, therefore, must apply to 'nations' in their collective capacity."

<sup>1</sup> Marshall on Ins. (4th ed. by Shee), 494.

<sup>2</sup> Phillips on Ins. § 1110.

<sup>3</sup> 2 Arnould on Ins., 808.

policy alleging the loss to be by capture." Benecké says: "Capture by an enemy or pirate is *prima facie* a total loss."<sup>3</sup> If we translate the French word *prise* by capture, this would be the doctrine of Pothier, who says: "La prise est l'acte d'un ennemi, d'un pirate ou autre qui s'empare du navire."<sup>4</sup> So Valin, in his *Ordonnance de la Marine*, says: "Les assureurs sont garants des prises faites par des ennemis ou *des pirates*."<sup>5</sup> In a recent interesting case in Massachusetts,<sup>6</sup> the court, in an elaborate opinion

<sup>3</sup> Benecké, *Pr. of Indemn.* 348.

<sup>4</sup> Pothier, *Assur.* sec. 56, n.

<sup>5</sup> Valin, *Ord. de la Mar.* liv. 3, tit. vi. art. 26.

<sup>6</sup> *Dole v. N. E. Mut. Mar. Ins. Co.*, 6 Allen, 378. In this case there were two actions of contract upon policies of insurance dated on the 19th of November and the 17th of December, 1860, respectively, by the first of which the defendants in the first action insured the plaintiffs in the sum of \$10,000, and by the second of which the defendants in the second action insured the plaintiffs in the sum of \$5,000, on the ship *Golden Rocket* for one year. The two actions were tried together. The policies contained the usual clause as to the risks which the insurers undertook to bear, viz. "the sea, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master (unless the insured be owner of the vessel), and of the mariners, and all other losses or misfortunes which have or shall come to the damage of the said vessel or any part thereof." In each policy there was a warranty that the ship should be free from capture, seizure, or detention, or the consequences of any attempt thereat, any stipulations in the policy to the contrary notwithstanding. The plaintiff's interest, and due notice, proof of loss, and demand of payment as for a total loss, were ad-

mitted. It appeared by the evidence and by the admission of the defendants, that on the 3d of July, 1861, the *Golden Rocket* was taken with an irresistible force by the *Sumter*, an armed steamer claiming to act under the so-called Confederate States, and first deceiving the officers of the *Golden Rocket* by displaying a United States flag; that Raphael Semmes, the commander of the *Sumter*, was a citizen of Maryland, which had never seceded, and most of the other officers were citizens of certain of the United States which pretended to have seceded; and that after removing the officers and crew of the *Golden Rocket*, and plundering her of some sails, spars, provisions, and other articles, they burned her. The defendants contended that the facts proved brought the cases within the fair meaning of the warranty, and that the plaintiffs were not entitled to recover on the policies, whether the ship was taken by persons who might be properly designated as pirates or not, or whether their acts were lawful or unlawful, because the loss was caused by acts which constituted a capture, in the sense in which that word was used in the contract. The question before the court was as to the true interpretation of a warranty "free from capture" in a policy of marine insurance. From the opinion of *Bigelow*, C. J., we make the following extract: "We have extended these ci-



rendered by Bigelow, C. J., examine this question very thoroughly, and come to the conclusion that the word "capture," as used

tations to an unusual length, in order to make it apparent that in legal nomenclature there is no such limitation of the meaning of the word 'capture' as that which must be given to it in order to charge the underwriters on these policies. It is true that there is no direct decision that a taking by pirates is a capture. Nor is there any to the contrary. Probably the precise question has never before arisen. But we think it cannot be doubted that such an application of the word is not inapt or unusual, but is in conformity to long-established and well-considered legal phraseology. We do not mean to say that the word is not often used in a different sense. Certainly it is frequently applied to the seizure of vessels by belligerent cruisers, and by persons acting under the authority of governments. But such use only shows that it has a double signification as applied to maritime contracts and adventures, and is no just foundation for an argument in favor of restricting its meaning to one species of taking rather than to another, when there is nothing in the contract or the subject-matter to which it relates to indicate any intention by the parties to use it in a special or limited sense. On the contrary, where a word or phrase is inserted in a contract which may be properly said to have two or more meanings, each of which is appropriate and suitable to describe results or events which may in certain contingencies occur or arise in the practical operation of the contract, and which must therefore be presumed to have been in the contemplation of the parties, the true rule of exposition, in the absence of any contrary intent, is to interpret it as

having been used by the parties in its fullest and most comprehensive sense.

"The authorities which we have cited would well warrant us in holding that the word 'capture,' as applied to the contract of insurance, is broad enough to include within the exception in the policy a taking by pirates in the most enlarged sense in which that term is used, that is, a taking by common depredators and plunderers, who do not merely make war on the ships or vessels of a particular country, or seek to destroy or take forcible possession of the property only of citizens of any one nation or government, but who commit robbery and pillage upon all persons and property found on the high seas, *lucri causa*, and who may, therefore, properly be designated as *hostes humani generis*. But it is not necessary to go to this extent in giving a construction to the warranty in the policies declared on. On the facts offered in proof at the trial, it cannot be contended that the persons who seized and burned the plaintiffs' ship are to be regarded as pirates within the ordinary signification of that word, as used in the law of nations, or as commonly understood and applied in maritime contracts and adventures. They were not common robbers and plunderers on the high seas. Although their acts were entirely unlawful, and cannot be justified in the courts of any State recognizing the authority of the Constitution of the United States, and although by the laws of Congress, which are the supreme law of the land, the persons who committed these acts are liable to be adjudged guilty of piracy, and to be punished accordingly, it is, nevertheless, true that it was offered to

in the policy, includes seizure by a pirate, and cite three English cases<sup>1</sup> as tending in the same direction. These high authorities

be shown in proof, and for the purposes of this discussion it is to be assumed that it could have been proved, that they acted under a semblance of authority, to say the least, which takes their acts out of that class which can be properly termed ordinary piracy. It is alleged that they sailed under a letter of marque issued by a government *de facto*, claiming to exercise sovereign powers, and to be authorized to clothe their officers and agents with the rights of belligerents, and to send out armed cruisers for the purpose of taking enemy's vessels *jure belli*. Nor is this all. It was also offered to be proved that at the time of the loss of the plaintiffs' ship, this *de facto* government had proceeded to raise armies and put them into the field, by which an actually existing state of war between it and the government of the United States was created, which had led two of the leading nations of Europe to recognize the persons who had thus conspired together against the authority of the United States as exercising the rights, and entitled to the privileges, of a belligerent power. It was under an authority derived from these persons that the plaintiffs' ship was taken and destroyed. In this state of facts, it would be going very far to say that the taking of a vessel by an armed cruiser of such *de facto* government cannot be properly designated as a capture. Indeed, such an interpretation would limit the meaning of the word, as applied to mercantile contracts, to acts of forcible taking of ships or vessels on the high seas, by duly constituted and recognized govern-

ments acting according to the laws of war, and would exclude all such acts if unlawful or unjustifiable, or contrary to the municipal laws of the country in which the contract was made and to be performed, although done under an authority purporting to come from a government *de facto* engaged in actual war, and claiming to exercise belligerent rights. We know of no authority and can see no good reason for putting such a narrow and restricted construction on the words of the warranty. But it is very strenuously urged by the learned counsel for the plaintiffs that, whatever may be the legitimate signification of the word 'capture,' in ordinary maritime contracts, it is manifestly intended by the parties in the policies declared on to have a limited meaning, and to be applicable only to belligerent taking, or the acts of governments. This argument is based on that clause of the policies by which it is stipulated that, in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is established of condemnation, or of the continuance of the detention (by capture or other arrest), for at least ninety days; and it is significantly asked, Can pirates condemn? and can our courts recognize any condemnation within the territory of the United States without a judicial commission from the President? to which we answer, Certainly not. But these questions do not cover all that is comprehended in the clause relied upon. They would have approached much more nearly to test questions if the clause had

<sup>1</sup> Goss v. Withers, 2 Burr. 694, 695; Powell v. Hyde, 5 El. & Bl. 607;

Kleinwort v. Shepard, 1 El. & El. 447, S. C. 5 Jur. (N. S.) 863.

must settle the law. We cannot but think, however, that the meaning of capture, as understood by both parties to a policy of

stopped at the word 'condemnation.' But it does not. It is put in the alternative, and includes 'detention' by capture, as well as a change of property by condemnation in a duly constituted prize court, or other recognized judicial tribunal. Now while it is true that capture followed by condemnation can take place only in case of a belligerent taking or capture by the authorized act of agents of a government, it is equally true that capture followed by detention might result from an unlawful or piratical aggression. It seems to us, therefore, that this clause furnishes no sufficient ground for giving to the warranty from capture an interpretation which shall confine it to one kind of taking, and exclude the other. Nor is this conclusion at all inconsistent with the object which the clause relating to condemnation and detention by capture was designed to accomplish. The manifest purpose of the stipulation was, that, in assuming a liability for capture, the underwriters did not intend to give up the chance that captors might not be able to procure a condemnation, or that the vessel might escape or be recaptured. In the latter alternative, if the vessel was taken by pirates, the property would remain in the original owners, and there would be no loss under the policy, in like manner as if, in the former alternative, the captors failed to procure a condemnation. Nor is it to be overlooked, in this connection, that the clause relating to a loss by capture is unlike that which has reference to a loss by seizure. That stipulation is expressly confined to loss or damage which may arise by seizure 'for or on account of illicit or pro-

hibited trade, or trade in articles contraband of war.' This stipulation might well be held to limit the word 'seizure,' as a cause of loss to a seizure by the authority of governments, because they only can seize property for breach of the laws of trade, or for the transportation of articles contraband of war. Such has been the interpretation of this clause by judicial tribunals. *Johnston v. Ludlow*, 1 Caines, Ca. 29, and 2 Johns. Ca. 481; *Carrington v. Merchants' Ins. Co.*, 8 Pet. 518. It was chiefly on this ground that the case of *Swinerton v. Columbian Ins. Co.*, 9 Bosw. 361, cited at the argument, was decided by the Superior Court of the city of New York. The vessel in that case was not taken on the high seas, but was seized under the alleged authority of the State of Virginia, while lying at the wharf in Norfolk. Besides, the stipulation relating to capture in the policy declared on in that case is expressly limited to a loss by capture followed by condemnation, and does not, as in the case at bar, provide for capture followed by detention for a given period. But we have no occasion in the present case to decide on the precise import of the word 'seizure' in the warranty. It was suggested, in behalf of the plaintiffs, that the word 'capture,' as it stands in the warranty, is to be limited to the same class of risks as those designated by seizure and detention, and that as these latter apply to acts of governments only, the former must have a like construction. But it seems to us that this is not a case where the rule, that words standing together are to be interpreted as signifying things *ejusdem generis*, is applicable. The object of the warranty

insurance, and indeed in the mercantile world generally, is some kind of seizure by governmental authority, actual, or supposed, or pretended. Chief Justice Bigelow admits: "It is true that there is no direct decision that a taking by pirates is a capture." He adds, however: "Nor is there any to the contrary. Probably the precise question has never before arisen." Arnould, in a

is to create an exception from the risks enumerated in the policy. The true mode of ascertaining the construction to be given to the words of the warranty is *reddendo singula singulis*, and to apply them to the risks specified, and to hold that they accept each risk which may fairly be comprehended within their legitimate meaning. As the risks are clearly not *ejusdem generis*, it is fair to infer that the words creating an exception from them were not designed to apply to one portion of them to the exclusion of another, which was aptly designated by one of the terms used. We have been led by these considerations to the conclusion that, on the facts proved at the trial, the taking of the vessel was a capture in the sense in which that word is used in the warranty, and that the defendants are not liable for a loss thereby occasioned, because it was among the risks which were expressly excepted from the policy. But it is further contended by the plaintiffs, that, if this was a case of capture, then the loss under the clause of the policy already cited was not total until condemnation, or the continuance of the detention by capture for at least ninety days, and that within this period the ship was totally lost by fire, and that for this loss the defendants are liable. But the contract of the parties will not support such a construction. The argument overlooks the effect of the exception created by the warranty. A loss by capture was excepted from the risks. When that event happened,

the contract of the parties terminated. There is no stipulation in the policy that the insurers were to remain liable after the ship had passed into the hands of her captors. The clause limiting the right to abandon in case of capture until proof of condemnation, or until the detention has continued ninety days, is intended only to restrict the liability of the underwriter where he assumes the risk of capture; but it cannot be construed as extending his liability to a time subsequent to the capture, where that risk is excepted by the terms of the contract. The cases, therefore, in which it is held that where the insurer is liable for capture if followed by condemnation, or detention for a prescribed period and a subsequent abandonment, he is also liable for any supervening peril occurring during the intermediate period, are not applicable to cases like the present, where the risk of capture is not assumed by the underwriter. The result is, that the proof offered by the plaintiffs was insufficient to maintain their actions; and, according to the agreement of the parties, the order must be, *cases to stand for trial*."

An action was tried on these policies in the Circuit Court of the United States, and decided for the defence, but on somewhat different grounds, *Clifford, J.*, giving the opinion. See also *Doyle v. Merchants' Ins. Co.* 51 Me. 465; *Monongahela Ins. Co. v. Chester*, 43 Penn. St. 491. Actions involving similar questions are now before the Supreme Court of the United States.

paragraph previous to that just above quoted from him, has this statement: "Capture, *properly so called*, is a taking by the enemy as prize in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken." If the intention of the parties, or their common understanding, is to determine the construction of this word, we repeat that we cannot believe that either insured or insurers in England or in America have understood by the word "capture" anything more than is included in the above-cited definition by Arnould. And the remarks made by many writers, as by Kent for example, that "every species of capture, whether lawful or unlawful, is also a loss within the policy,"<sup>1</sup> must then be understood as referring to capture under some governmental authority made in accordance with or in violation of the laws of nations. We admit that the wider meaning of the word "capture" is now settled by authority. But the views stated by the Supreme Court of Massachusetts, in the case referred to, are to this extent *obiter*, that they were not necessary to the decision of the case. We give a full account of this case in our notes. Here we will only say that the action was on a policy containing a stipulation warranted free from capture. The vessel was seized by the rebels during the recent civil war. The plaintiffs claimed under the insurance against pirates and assailing thieves. The court begin their decision, in the manner already stated, to show that the warranty against capture was a warranty against piracy; but then go on to say: "It is not necessary to go to this extent in giving a construction to the warranty in the policies declared on." And later they say that the captors "acted under a semblance of authority, to say the least, which takes their acts out of that class which can be termed ordinary piracy."

It may be said that the court would have decided in favor of the insurers, on the first ground alone, had it been necessary. But it may be answered, that it was not necessary, and they did not decide it on this ground. For on this last point the court are quite decided, that as the captors sailed under a letter of mark issued by a government *de facto*, which had been treated by our own as a government *de facto*, and had been recognized by two of the leading nations of Europe as exercising the rights and entitled to the

<sup>1</sup> 3 Kent, Comm. 304.

privileges of a belligerent power, this was enough to discharge the insurers, using the word "capture" in its ordinary sense.

Another interesting question is decided in this case. The policy provided that if the vessel was captured, the loss was not total until condemnation, or the continuance of the detention for ninety days. But before condemnation, and within ninety days, the ship was totally lost by fire, the rebel cruiser having burnt her soon after the seizure. And the insured claimed that this was a distinct cause of loss covered by the policy, not excluded by any exception, and for which the insurers were liable. The court, however, decided that, as a loss by capture was excepted from the risks insured against, when that took place the contract was entirely terminated. Many cases were cited by the counsel for the plaintiff, showing that where the insurer is liable for a loss by capture, if followed by condemnation and abandonment, or for a loss by detention for a prescribed period followed by abandonment, he is also liable for any loss by a peril insured against occurring during the intervening period. But the court held that these authorities are not applicable to cases where the risk of capture is not assumed by the insurers.

It has been held in a recent case, that a warranty by the insured, in a policy of insurance, that the vessel shall be free from capture, seizure, or detention, does not include a mutinous taking possession of the vessel by the mariners.<sup>1</sup>

In a late English case, where a policy of insurance on a voyage from Macao to Havana contained the words, "warranted free from capture and seizure," the Chinese emigrants who were on board piratically and feloniously assaulted the captain and crew, and took the vessel, whereby she was lost. Held, a "seizure" within the warranty.<sup>2</sup>

The word "people" has been defined to mean "the supreme power; the power of the country," whatever that may be.<sup>3</sup> "Capture," or its equivalent, "seizure," means a taking with intent to keep;<sup>4</sup> "arrest," or "detention," a taking with intent to return

<sup>1</sup> *Greene v. Pacific Ins. Co.*, 9 Allen, Ins. Co., Dudley, S. C. 239. It does not cover, therefore, damage done to the cargo by an armed mob. *Nesbitt v. Lushington*, 4 T. R. 783.

<sup>2</sup> *Kleinwort v. Shepard*, argued in the Exchequer Chamber, and reported in 22 Law Reporter, 164.

<sup>3</sup> See *Simpson v. Charleston F. & M. ed.*, 420, says: "In capture, the object

<sup>4</sup> *Emerigon*, c. 12, § 30 (Meredith's



the thing taken ;<sup>1</sup> as where a ship is arrested by an embargo,<sup>2</sup> or stopped for search,<sup>3</sup> or detained in a port by an actual blockade thereof,<sup>4</sup> or, perhaps, by being lawfully restrained from entering her port of destination by a blockading force. But it does not seem to be positively settled, whether the master has a right to abandon the voyage and claim for a total loss, on receiving intelligence that his port of destination is blockaded.<sup>5</sup> In a case where

is to appropriate to one's self the prey :

*Si commette depredatione con appropriarsi il depredato.* In an arrest of princes, there is a design to liberate subsequently the property arrested, or to pay the value of it." See also *Powell v. Hyde*, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44 ; *Black v. Marine Ins. Co.*, 11 Johns. 287.

<sup>1</sup> See *Emerigon* as cited in note, *supra*. But the court, in *Mumford v. Phoenix Ins. Co.*, 7 Johns. 449, speak of an illegal condemnation as a loss under the general peril of arrests and detentions of princes. Lord *Ellenborough*, in *Carruthers v. Gray*, 3 Campb. 142, held that an averment that the ship and goods were arrested by persons exercising the powers of government at a certain place, and that the goods were there detained and confiscated, was supported by proof that the goods were forcibly taken possession of by the officers of government. In *Olivera v. Union Ins. Co.*, 3 Wheat. 183, *Marshall, C. J.*, speaking of arrest and detainment, said : "Each of these terms implies possession of the thing, by the power which arrests or detains." The seizing of a vessel, and turning it into a fire-ship, has been considered a restraint. *Green v. Young*, 2 Salk. 444, 2 Ld. Raym. 840, per *Holt, C. J.*

<sup>2</sup> *Rotch v. Edie*, 6 T. R. 413. The vessel in this case was detained in a foreign port by an embargo. See also notes *infra*.

<sup>3</sup> 1 *Magens*, 67.

<sup>4</sup> In *Olivera v. Union Ins. Co.*, 3 Wheat. 183, this was held to be a restraint, and in *Wilson v. United Ins. Co.*, 14 Johns. 227, a detention. In *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102, 109, *Parsons, C. J.* said : "In this instrument, I know of no difference between the import of restraint and detention. They are respectively the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained, and whenever she is detained she is under restraint." *Marshall, C. J.*, on the other hand, in *Olivera v. Union Ins. Co.*, *supra*, held that a detainment implied possession, while a restraint did not, and that a blockade was, therefore, a restraint. It is, however, a matter of little consequence, since the words are always used together. *Saltus v. United Ins. Co.*, 15 Johns. 523, was a very similar case to that last cited, and it was decided the same way. But in *Brewer v. Union Ins. Co.*, 12 Mass. 170, where the vessel was blockaded at an intermediate port, the underwriters were held not liable. It is impossible to distinguish this case from those above cited, and we are inclined to the opinion that the former are more correctly decided.

<sup>5</sup> The decisions upon this subject are conflicting. It has been held that if, while a vessel is on its voyage, the master hears that her port of destina-

insurance was effected on slaves, and the vessel was driven into a port of distress and the slaves liberated on *habeas corpus*, it was

tion is closed by an embargo, and abandons the adventure, this is not a loss by a peril insured against. *Hadkinson v. Robinson*, 3 B. & P. 388; *Blacken-hagen v. London Ass. Co.*, 1 Campb. 454; *Forster v. Christie*, 11 East, 205; *Amory v. Jones*, 6 Mass. 318. And so, if on arrival at the port of destination, it is found to be in the possession of the enemy. *Lubbock v. Rowcroft*, 5 Esp. 50; *Smith v. Universal Ins. Co.* 6 Wheat. 176. The vessel in this case was chased off the coast, and after making several fruitless attempts to return, gave up the voyage and sailed for home. Mr. Justice *Story* said: "In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient that the voyage be abandoned for fear of the operation of the peril." It is to be observed, however, that in this case the underwriters were expressly exempted from loss by illicit trade, as in *Suydam v. Mar. Ins. Co.*, 1 Johns. 181. The case, therefore, does not support the English and Massachusetts decisions to their full extent. See *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, 21. In *Barker v. Blakes*, 9 East, 283, it was held, that where a neutral vessel was captured and her port of destination blockaded, pending the proceedings in admiralty, an abandonment might be made after her release, on the

ground that the impossibility of prosecuting the voyage to the port of destination was in consequence of the prolonged detention of the ship and cargo, and so might be considered a loss of the voyage. In *Parkin v. Tunno*, 2 Campb. 59, 11 East, 22, insurance was effected on goods from Bristol to Monte Video, and any other port or ports in the river Plata, in the possession of the English. When the vessel arrived in the river Plata, every port except Maldonado was in the possession of the enemy. She therefore sailed for that port, but, on her arrival, was ordered away by the English commander there. She then sailed for Rio Janeiro, that being the nearest friendly port of safety, and on the way the cargo was damaged by a peril of the sea. The underwriters were held not to be liable.

The above cases proceed upon the ground that the fear of a peril insured against is not a good reason for an abandonment. That this principle is generally correct, cannot be denied; the only question is, When is it to be applied? See *Craig v. United Ins. Co.*, 6 Johns. 226. In *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102, it was held, that if a neutral vessel sails for a port, and is met on the way by a belligerent vessel and informed that the port is blockaded, and a warning not to proceed thither is indorsed on the register, the underwriters are not liable for a loss owing to the voyage being broken up. See also *Cook v. Essex F. & M. Ins. Co.*, 6 Mass. 122; *Wheatland v. Gray*, 6 Mass. 124; *Lee v. Gray*, 7 Mass. 349; *Tucker v. United M. & F. Ins. Co.*, 12 Mass. 288. In some of the States the decisions are the other way.

held, that this loss came within the terms "arrest, restraints, and detainments," etc.<sup>1</sup>

A "restraint" must be "an actual and operative restraint, and not a merely expected and contingent one."<sup>2</sup>

*Schmidt v. Union Ins. Co.*, 1 Johns. 349; *Vigers v. Ocean Ins. Co.*, 12 La. 367; *Symonds v. Union Ins. Co.*, 4 Dall. 417, 1 Wash. C. C. 382; *Thompson v. Read*, 12 S. & R. 440; *Savage v. Pleasants*, 5 Binn. 403. Mr. Justice *Brackenridge*, in this case, attached great importance to the fact that the warning not to proceed had been indorsed on the register. He said: "It alters the character of the vessel, and makes it *sub modo* a different property. The British themselves speak of such marking or indorsing on sea-letter and register, as giving them a qualified property in the vessel and cargo, and they act upon it accordingly, and seize and capture outright, if an attempt is made to go to another than a British port as ordered to proceed. The hailing and warning a vessel at sea are not the same with entering on board and indorsing papers. The sound of the warning carries no impression with it, it is a monition to the warned; but who shall know that a vessel has been warned? But the writing on the sea-letter and register carries with it its own evidence, and will be seen by those who visit it afterwards. It is a charm or spell from which the vessel cannot escape; she is liable to be taken, and is uniformly taken, if she attempts to proceed or to return."

In *King v. Del. Ins. Co.*, 2 Wash. C. C. 300, a blockade of the port of destination was considered as a restraint; but it was held, that where a vessel was stopped in the first part of her voyage, and warned not to proceed by an indorsement on her papers, and verbally informed that her port of destination

was blockaded, and she returned home and abandoned the voyage, the underwriters on freight were not liable, the port of destination not being actually blockaded. *Washington, J.*, said: "If the underwriter is to answer for a technical total loss, where none has really been sustained, it is the duty of the insured to do all he may to prevent such loss, and he should proceed upon his voyage until the danger of an actual loss is rendered manifest." This case was affirmed on appeal, 6 Cranch, 71, on the ground, that the voyage was not prohibited by the British orders in council, and the port of destination was not actually blockaded.

There is a dictum of Mr. Justice *Story* on this subject, which is worthy of attention. He says: "Whether the turning away of a ship from the port of destination, in consequence of a blockade, be in any case a good cause for abandonment, so as to entitle the assured to recover it from the underwriter as for a total loss, by the breaking up of the voyage, and, if so, whether the doctrine could apply to a policy with a warranty of neutrality, the legal effect of such warranty being to compel the party to abandon the voyage, if it cannot be pursued consistent with neutrality, are questions of great importance, upon which the court do not think it necessary to express any opinion." *M'Call v. Mar. Ins. Co.*, 8 Cranch, 59. See also *Emerigon*, c. 12, § 31 (*Meredith's ed.*), 425.

<sup>1</sup> *Simpson v. Charleston F. & M. Ins. Co.*, Dudley, S. C. 239.

<sup>2</sup> *Atkinson v. Ritchie*, 10 East, 530, 534, per Lord *Ellenborough*, C. J.

If the seizure is caused by the unlawful act of the master, it would seem that the underwriters are not liable; but in determining this point the parties stand on their strict rights, and, if the master had the right to do the act which led to the seizure, the underwriters are liable, provided he acted *bona fide*, although, by adopting another course, the seizure might have been avoided.<sup>1</sup> And where the lawfulness of the act of the master, and consequently the legality of the seizure, depend upon the fact, whether the power which seized the vessel had the right to exercise jurisdiction over the place where the offence was committed, the question must be determined by the fact, whether the government of the country to which the vessel belongs recognizes the right of jurisdiction on the part of the seizing power.<sup>2</sup> If a suit is commenced against a captain by the government in a foreign port, and the voyage is consequently delayed, the underwriters are not liable for the detention, the proceedings being against the captain personally, and not against the ship.<sup>3</sup>

Policies are sometimes made containing a stipulation authorizing the vessel to proceed to another port, in case the port of original destination is blockaded.<sup>4</sup> And insurance

<sup>1</sup> *Sewell v. Royal Exch. Ass. Co.*, 4 Taunt. 856; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, 13 Pet. 415.

<sup>2</sup> *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, 13 Pet. 415. The question in this case was, whether the government of Buenos Ayres had jurisdiction over the Falkland Islands, and the court held that it was bound by the acts of the government of the United States, and could not examine the question *de novo*.

<sup>3</sup> *Bradford v. Levy*, 2 Car. & P. 137.

<sup>4</sup> *Naylor v. Taylor*, 9 B. & C. 718; *Ferguson v. Phoenix Ins. Co.*, 5 Binn. 544. In this latter case, the insurance was on sugars from New York to Amsterdam, "with liberty, in case of being turned off on account of blockade, to proceed to a neighboring port." On the voyage, the vessel was boarded by a British privateer and her papers in-

dorsed, "warned not to enter, or attempt to enter, an enemy's port." In consequence of this, she proceeded to Cowes, remained there about a month and a half, paid duties, obtained a license for Amsterdam, and was about to depart, when she was seized by a British vessel and sent into Portsmouth. The vessel was libelled and restored. The captain then sailed again for Amsterdam, but was captured by the British. The vessel was a second time libelled and again restored. By this time her license had expired, and information having been received that the decrees of the French and Dutch governments, prohibiting the entry into their ports of any vessels coming from England, were rigorously enforced in Holland, the captain took the ship to London and landed her cargo. On the receipt of this intelligence, the plaintiffs abandoned. A

is often made against *unlawful* arrests, restraints, and detentions only.<sup>1</sup>

majority of the court, consisting of two judges, held that London was a neighboring port within the meaning of the exception, and that, as the captain was justified in going there under the policy, the voyage was to be considered as there completed, and that the underwriters were therefore not liable. Mr. Justice *Brackenridge* was of the opinion, that the indorsing of the papers was a capture *sub modo*, and that a port of England was not a "neighboring port," within the meaning of the exception, on account of the nature of the cargo. The learned judge states in his decision that the vessel was ordered to proceed to a British port, when first stopped on the high seas. This does not appear by the statement of facts in the case, but is important, as showing that the voyage to Cowes was not a deviation, but imposed by necessity. The learned judge was, however, of the opinion, that the delay at Cowes amounted to a deviation which discharged the underwriters, and so agreed with his brethren in the result. See also *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457, 473.

In *Radcliff v. United Ins. Co.*, 7 Johns. 38, 9 Johns. 277, the policy contained this clause, namely: "The insurers take no risk of a blockaded port, but, if turned away, the assured to be at liberty to proceed to a port not blockaded." It was held, that if the port was actually blockaded, the underwriters were not liable, either for a legal or an illegal seizure occasioned by an attempt to enter it. In *Tenet v. Phoenix Ins. Co.*, 7 Johns. 363, insurance was effected on a vessel from New York to Bordeaux, warranted not to abandon, if detained or captured, until after the ex-

piration of a certain time, "nor if refused admittance or turned away, but may proceed to another *near open port*." When the vessel was about twenty leagues from the island of Oleren, she fell in with a British squadron, and was informed that the whole continent was blockaded, and a warning not to proceed was indorsed on the register. The captain was ordered to proceed to England or Malta or return home. He then sailed for England, but, having met with a storm, put into L'Orient in distress, where the vessel was seized. Held, that whether Bordeaux was blockaded or not made no difference, as the facts showed that the vessel was prevented from entering her port of destination by the presence of the squadron, that the ports of France were to be considered as "open ports," and that the term "*near open port*" was to be considered as used in a geographical sense, and not as depending on a facility of reaching a distant port, if the wind should happen to be favorable, and that a port in England was not a near port.

<sup>1</sup> In such a case, the qualification "unlawful" applies to "restraints and detainments," as well as to arrests, and the underwriters are not liable in case the voyage is broken up by the port of destination being lawfully blockaded. *M'Call v. Marine Ins. Co.*, 8 Cranch, 59; *Thompson v. Read*, 12 S. & R. 440. But if the restraint is not authorized by the law of nations, it is unlawful, as where a neutral vessel with a cargo laden before the commencement of the blockade is prevented from leaving port. *Olivera v. Union Ins. Co.*, 3 Wheat. 183.

## SECTION VIII.

*Of Loss by Payment of Salvage.*

THIS word "salvage" has, in the law-merchant and in mercantile usage, two entirely distinct meanings. One of these is, so much of the property as is saved in case of wreck or other disaster. The other is, so much of the property as is given by a court of admiralty to "salvors," or those who save maritime property from peril.

If the property thus saved be insured, the amount decreed to the salvors is a loss by the owners which the insurers must pay. Hence, the insurers are more directly interested than the insured in the defences to a claim of salvage; and the defence is conducted for their benefit, although in the name of the insured.

Salvage in this sense is eminently, and almost exclusively, a subject of admiralty jurisdiction, and is fully treated of only as a separate topic,<sup>1</sup> or in connection with the jurisprudence and practice of admiralty. Here we shall give but a condensed statement of its rules and principles, as they may be of immediate importance to insurers.

*A. Some Rules of Practice.*

There may be distinct and successive sets of salvors, whose respective claims will be adjusted by the court.<sup>2</sup> But all salvors

<sup>1</sup> As in the excellent work on Salvage by Judge Martin.

<sup>2</sup> This is well illustrated in the case of *The Bark Island City*, 1 Black, U. S. 121. The facts in the case were as follows: This was a libel for salvage, by the owners of the steamer *Westernport*, against the bark *Island City*. The libel was filed in the District Court of the United States for Massachusetts, and was removed into the Circuit Court on the certificate of the District Judge that he was interested. In January, 1857, the *Island City*, on her voyage from Galveston to Boston, made Cape

Cod in a storm, and brought up near the Horseshoe in a disabled condition. The schooner *Kensington* went out from Hyannis to her assistance, but after every effort, was unable to get her into port. The owners of the *Island City*, being informed of her condition, requested the master of the steamer *R. B. Forbes* to go to her aid. He did so, and found her where the *Kensington* had left her, and in the helpless condition mentioned. The steamer took the bark in tow, with the intention of carrying her into Boston; but the next day but one, the coal being found to be



of the same property may join in one libel; and it is now held that they should so join, in order to save expense; and, therefore, where several libels are filed by libellants who might as well have joined, admiralty will not charge their costs to the property saved. This rule of late introduction is now strongly insisted upon in a recent case arising from salvage occurring on our Western waters.<sup>1</sup> Where, however, the libellants have rights or claims which may be adverse, as if one set of libellants were in one vessel, and another set in another, they may each file a libel.<sup>2</sup>

insufficient, she took off the crew of the bark, left her at anchor off Nantucket Island, without any person on board, and went to Provincetown for a supply of coal; and when, a number of days afterwards, she was able to return to the place where she had left the *Island City* at anchor, she was not there. The steamer *Westernport* had discovered her the day before the return of the *Forbes*, took her in tow, and brought her into Hyannis, where she was followed by the *Forbes* and brought to Boston. The owners of the schooner *Kensington*, of the steamer *R. B. Forbes*, and of the steamer *Westernport* all filed libels against the *Island City* for salvage, and the three cases were heard together. On the above facts it was held, that parties who find a vessel derelict at sea, and carry her into port, are entitled to the usual salvage, without regard to meritorious but unsuccessful efforts previously made to rescue her by other parties. Secondly, that to constitute a case of derelict, it is not sufficient that the crew have left temporarily to procure assistance; the abandonment must be final, without hope of recovery, or intention of returning.

Also, that if a ship disabled at sea is partially aided by one vessel, further assisted by another, then left with nobody on board, at anchor, but still in peril, while better means of rescue are

sought for, and in that condition she is discovered by a third vessel which brings her into a safe port, then this is a case in which all three of the vessels are entitled to share in the salvage awarded.

<sup>1</sup> The rule is clearly laid down in the case of *The Steamboat Edward Howard*, 1 Newb. Adm. 522. In this case there was a non-joinder of salvors in the libel, and the court, *McCaleb, J.*, presiding, held that although it was with reluctance that it required the payment of costs by salvors, yet, as the case now stood before the court, no other judgment could properly be given; and that the court could not be responsible for irregularities committed in the institution of suits of this nature, which, like suits in equity, should embrace all as parties who are interested in the final decree. In the case of *The Ship Henry Ewbank*, 1 Sumner, 400, *Story, J.*, in delivering the opinion of the court, forcibly lays it down, that in all cases where unnecessary libels or claims are filed, it is at the peril of paying costs. Also see the case of *The Schooner Boston*, 1 Sumner, 328, in reference to the above.

<sup>2</sup> This was so held in the case of *The Ship Henry Ewbank*, 1 Sumner, 400, where the British bark *Hope* and the brig *Pedang* of Boston, having adverse interests, filed separate libels.

Even then, however, the court may consolidate the libels for their own convenience in hearing the case.<sup>1</sup> But any claims for freight, or general average, or otherwise on the proceeds of the property saved, must be made in a separate libel, as the salvors have no interest in them.<sup>2</sup>

### B. *Who may be Salvors.*

No persons can claim compensation as salvors for any acts which it was their duty to do.<sup>3</sup> The very essence of salvage compensa-

<sup>1</sup> In the case of *The London Merchant*, 3 Hagg. Adm. 394, which was a cause of salvage for services rendered to the above-named vessel, by the steamer *Majestic* of Hull, and, a separate action having been entered for Lieutenant Dooley (and five men under his command) of the coast guard, the two actions were consolidated. This point is also well illustrated in the case of *Rich v. Lambert*, 12 Howard, 347, 353, where several owners of a cargo filed libels *in rem* against the vessel for damages done to the goods, and these libels were consolidated by order of the court. Mr. Justice *Nelson*, in delivering the opinion of the court in the above case, speaks as follows: "The joining of several owners of cargo conveyed in the same ship in a libel *in rem* for damages done to the goods in the course of shipment, and the consolidation of libels, filed separately by the respective owners for like damage, is allowed by the practice of the court for its convenience, and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties. In cases where the several claims against the ship are founded upon a common injury and loss, the questions

involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted."

<sup>2</sup> In the case of *The Sybil*, 4 Wheaton, 98, Mr. Justice *Johnson* held, that the demand of ship-owners for freight and general average is to be pursued by a direct libel or petition, and not by a claim interposed in a salvage cause.

<sup>3</sup> The case of *The Neptune*, 1 Hagg. Adm. 227, 236, treats this point forcibly and fully. The case came on upon the summary petition of George Rounds, a seaman, claiming wages due to him from the master and sole owner of the *Neptune*. The petition alleged that Rounds was hired as a seaman, the ship being in the port of London, designed for a voyage to Rio de Janeiro, Hamburg, and London. The *Neptune* shortly afterwards sailed, with her cargo, to Rio de Janeiro, where she safely arrived, and discharged the same, thereby earning freight to a considerable amount. She then took on board a cargo for Hamburg, and proceeded on her voyage, but was driven by a gale of wind upon the French coast, and there stranded, so that only a part of the ship and no part of the cargo could be saved.

tion, and the ground on which it is carried far beyond the mere rate of wages, is to offer an inducement to those who can render assistance in a case of maritime peril, but are under no obligation to do so. And, on the other hand, if sailors could expect liberal compensation for even extraordinary efforts in saving ship or cargo from maritime peril, they would be under a strong temptation to let the vessel get into difficulty, and thus give them the opportunity of earning salvage. Hence, too, sailors' wages are always dependent on the termination of the voyage, and, if the ship be wholly lost, their wages are wholly lost; not because they

That Rounds and the other mariners exerted themselves very laboriously in saving the masts, spars, rigging, some of the sails, the anchors, and cables, and a considerable part of the hull, which were afterwards sold for much more than the wages of all the mariners who had sailed from Rio de Janeiro to the time when Rounds and the other mariners were discharged by the master. Lord Stowell, in delivering the opinion of the court, says: "What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favorable weather, but likewise, in adverse weather inducing shipwreck, to exert himself to save as much of the ship and cargo as he can. It is a part of his bounden duty, in his character of a seaman of that ship. It is certainly a laborious and probably a dangerous portion of his service, but certainly not less a service and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. I ask, is he to have no recompense for this continuation of his service in its most formidable shape

which that service to that ship can assume? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on a *quantum meruit*. There are, I think, decisive objections to both these views of the matter. The doctrine of this court is justly stated by Mr. Holt, that the crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship; not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. I will not say that, in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a *persona standi in judicio*. But they must be very extraordinary circumstances indeed; for the general rule is very strong and inflexible, that they are not permitted to assume that character."

may not have a kind of moral right to *pro rata* wages for the services they rendered before the loss, but because the law-merchant seeks to influence them by every possible inducement to do all that they can under all circumstances to save the ship.<sup>1</sup>

<sup>1</sup> This point is clearly laid down in *Miller v. Kelly*, Abbott, Adm. 564. This was a libel in *personam* filed by William Miller against James Kelly, to recover compensation for services rendered on board the respondent's vessel. The libellant shipped at Boston, on board the brig W. I. Dugan, of which the respondent was master, for a voyage to New York. He shipped as mariner, and engaged "for the run." The brig, encountering a gale in which she was much injured, put into Nantucket in distress, and there remained for about three weeks, when she was towed into New York by a steamer sent on for that purpose. The libellant commenced this action to recover compensation for the extra services rendered by him to the ship during the storm, and during the detention of the vessel at Nantucket. He claimed to recover either by way of salvage, or on a *quantum meruit*, for such services as being *extra* his contract. *Betts, J.*, in delivering the opinion of the court on the above facts, held that the claim for salvage could not be sustained. "No services," he says, "were rendered by the seaman beyond what was required of him by his duty to the ship. He was bound to the hazards of the voyage, and to bestow his best efforts for the preservation of the ship and cargo. Detentions, through perils and disasters of the sea, are risks assumed by seamen in every shipping contract, and no legal right arises to them from those causes, or their extra exertions to save their vessel, to demand an increased compensation." This question was considered at length by *Curtis,*

*J.*, in the case of the schooner *John Perkins*, U. S. C. C. Mass., 21 Law Reporter, 87, and in the cases of *The Steamer Acorn* and *The Schooner Speedwell*, 21 Law Reporter, 99. The learned judge, in the first of the above cases, said: "Though I am not prepared to deny that cases may arise in which the crew may become salvors of the vessel, it is not easy for me to foresee how such a case can arise, while their contract continues in force. The degree of distress certainly does not change the character of the service; and if the amount of personal exertion and hazard incurred in preserving the property can change the character of the service, what becomes of the rule of the maritime law, under which, as Lord Stowell says, 'it is the stipulated duty of the crew (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent'?"

The vessels in the above cases were enclosed in a field of ice, in a storm, and were temporarily deserted by most of their crews, who intended to return when the gale abated. The alleged salvage services consisted, in one instance, in one of the crew cutting the cable of the vessel, to avoid an impending collision with a vessel which was adrift, and in the other case in avoiding a collision by putting out fenders, to lessen the shock of the collision. Under these circumstances, *Mr. Justice Ware* decreed salvage, 19 Law Reporter, 490; but this decree was reversed in the Circuit Court, 21 Law

But a court of admiralty always exercises an equitable discretion in the application of its own rules; and where a crew have certainly gone further than their proper duty would have required of them, salvage has been allowed.<sup>1</sup> The same rule has been applied to pilots.<sup>2</sup>

Reporter, 87. See also *Beane v. The Mayurkee*, 2 Curtis, C. C. 72; *Mesner v. Suffolk Bank*, U. S. Dist. Ct. Mass. 1838, 1 Law Reporter, 249, where a claim for salvage of property on board, by one of the crew of a vessel which was sinking by reason of injuries received by a collision, was refused, although the circumstances of the case, as Mr. Justice Curtis remarks in the case of *The John Perkins*, *supra*, "would seem to have involved all the considerations in favor of the claim of one of the ship's company to be a salvor which could well be presented." In the case of *The Star*, Vice-Admiralty Court, Halifax, 14 Law Reporter, 487, two vessels came into collision, and got entangled together by their rigging. All the persons on board the *Star*, fearing she would sink, went on board the other vessel, soon after the two vessels came into collision. Shortly after this, some of the crew of the *Star* returned to their vessel, while the vessels were still entangled; and, while they were on board, the vessels parted, and reached port at last in safety. The court held, that, as the crew did not leave their vessel *animo non revertendi*, their services in bringing the vessel in were done under their contract as seamen, and that they were not entitled to salvage.

<sup>1</sup> Thus, in the case of *The Mary Hale*, decided in 1856, Marvin on Salvage, 161, the vessel was wrecked, and the mate and four seamen crossed the Gulf Stream in an open boat, a distance of one hundred and eighty miles, to procure assistance to take off the passen-

gers and cargo. They succeeded in their endeavors, and were the means of saving both. The court held that they were entitled to salvage, on the ground that their services exceeded the duty they owed to the ship. In the case of *The Ship Holder Borden*, U. S. Dist. Ct. Mass. 18 Law Reporter, 193, the vessel while on a whaling voyage was wrecked. The master and crew, after five months' labor, built a schooner out of the materials of the wreck, and saved over a thousand barrels of oil; she then sailed to Oahu, procured a vessel, and brought home the oil in safety. *Sprague, J.*, decreed salvage.

<sup>2</sup> A pilot, acting within the line of his duty, cannot entitle himself to claim as salvor by any exertions or any service as pilot, although he may become, like any other person, a salvor, if he performs extraordinary services, outside of the line of his duty. And if persons assume the character of pilots, and act as such, they must be compensated as such, and not as salvors. *The Cumberland*, 9 Jurist, 191. In *The Johannes*, 6 Notes of Cases, 288, a pilot seeking to recover salvage for mere pilotage service was severely reprimanded by the court. See also *The City of Edinburgh*, 2 Hagg. Adm. 333. In *The Jonge Andries*, 1 Swabey, Adm. 226, 229, Dr. Lushington considered the law to be, that, if a pilot went on board a vessel in distress, he might claim as salvor; but that, if he were engaged to take the vessel into port, he could not claim additional compensation if, in consequence of the

If the master of a ship in peril declines, or positively refuses the offered salvage service, and it is nevertheless rendered, the court would give this fact great weight in determining whether the service was properly rendered, that is, whether those who claimed to be salvors could be considered as having in that character any claim to compensation. But if the court were satisfied that the assistance was needed, and rendered under circumstances of maritime peril, which made it a case of salvage, the refusal of the master would have no influence in lessening their claims for compensation.<sup>1</sup>

weather becoming more boisterous, he should perform additional services. This case was affirmed on appeal, 1 Swabey, Adm. 303. In England it would appear that formerly extra efforts and exertions on the part of pilots were compensated as such, and not as salvage. *The Enterprise and The Columbus*, 2 Hagg. Adm. 178, note, decided in 1828; *The Funchal*, 3 Hagg. Adm. 386. In the case of *The Branken Moor*, 3 Hagg. Adm. 373, where a Deal boatman came off to the ship while lying in the Gulf Stream, and offered to pilot her into the Downs, his services were accepted; but on the following day, during a heavy gale, and in an intense fog, he run her ashore on Sandwich Flats, an expedient resorted to only in cases of extreme danger. The boatman libelled the vessel, which had subsequently by other assistance been got safely into port, for salvage; but his claim was not allowed, it being considered that he had not acted outside of his province of pilot. *The Elizabeth*, 8 Jurist, 365; *The Frederick*, 1 W. Rob. 16. In *The Helu*, 2 W. Rob. 246, it was held that pilots going on board a vessel in a leaking condition, and assisting the crew, and keeping down the water by pumping, were entitled to be rewarded as salvors. Also see *The Joseph Harney*, 1 Rob. Adm. 306; *The Elizabeth*, 8 Jurist,

365; *The Persia*, 1 Spinks, Adm. 166. In *The Industry*, 3 Hagg. Adm. 203, it was held to be no part of the duty of a pilot to tow a vessel; and to one so doing, and for undertaking other matters not within his duties as pilot, salvage was allowed. In *The King Oscar*, 6 Notes of Cases, 284, and in *The Hedwig*, 1 Spinks, Adm. 19, the general doctrine of the claims of pilots as salvors was applied to a foreign vessel. It has been held that when pilotage services are performed in a place where there are no licensed pilots, they are to be compensated for as salvage, when voluntarily performed by others. See *The Rosehaugh*, 1 Spinks, Adm. 267. But we should not consider that this would be so, if an agreement was made to act as pilot. See *The Jonge Andries*, 1 Swabey, Adm. 226, affirmed on appeal, 1 Swabey Adm. 303.

<sup>1</sup> See the case of *Clark v. Brig Dodge Healy*, 4 Wash. C. C. 651-656. In *The Jonge Bastiaan*, 5 Rob. Adm. 322, assistance was rendered to a vessel in great distress, even against the advice of the master, and salvage was allowed. *The Bee, Ware*, 332, was a case where a vessel, being temporarily abandoned, was taken possession of by several of the inhabitants of the island on which she had been cast, and safely navigated into port by them. On her way thither,



The officers and crew of our national vessels are entitled to claim salvage compensation for ordinary salvage service; but not, it is said, for suppressing a mutiny, because this comes within the strict line of their duty. But here, too, for extraordinary efforts or exposure to peril, salvage compensation might be made.<sup>1</sup> At least, we know of no statutory provision and no established

however (the master having returned in the mean time to the place where he had left her), she was overtaken by him, and possession demanded, which was in turn refused. A demand for salvage being made, it was allowed.

<sup>1</sup> In the English case of *The Francis & Eliza*, 2 Dods. 115, where a libel for salvage was filed by the officers and crew of a man-of-war, for services rendered in suppressing a mutiny on board a convict ship, Sir *William Scott* held that they were not entitled to salvage. But see the case of *United States v. The Armistad*, 15 Pet. 518, where salvage was allowed to the officers and crew of an American man-of-war for meritorious services. But for an ordinary salvage service they are clearly entitled to compensation. *The Lord Nelson*, Edw. Adm. 79; *The Pensamento Feliz*, Edw. Adm. 115. In the *Gage*, 6 Rob. Adm. 273, where the sloop *Kite*, an English man-of-war, found a schooner at sea abandoned by its captors, French privateers, and brought her safely to port, salvage was decreed. Also see *The Louisa*, 1 Dods. 317; *L'Esperance*, 1 Dods. 46; *The Mary Ann*, 1 Hagg. Adm. 158; *The Thetis*, 3 Hagg. Adm. 14; *The Elwell Grove*, Ib. 209; *The Wilsons*, 1 W. Rob. 172; *The Iodine*, 3 Notes of Cases, 140. In the case of *The Charlotte Wylie*, 2 W. Rob. 495, Dr. *Lushington* held, that the commander and crew of a vessel of war were entitled to remuneration, in the way of salvage, for putting a

sailing master and two seamen on board a homeward-bound merchant vessel, to assist in navigating the vessel, the master and one of the mariners of the merchant vessel being invalided with fever, and incapable of discharging their duties aboard. In *Robson v. The Huntress*, 2 Wallis, C. C. 59, a salvage service performed by an English man-of-war to an American brig on the coast of Africa was compensated for. *The Lustre*, 3 Hagg. Adm. 154. In *The Rosalie*, 1 Spinks, Adm. 188, 25 Eng. L. & Eq. 605, which was probably the last case in England on this subject prior to the statute referred to *infra*, Dr. *Lushington* expressed himself to be strongly in favor of allowing national vessels to claim as salvors. As the time and property which naval vessels subject to risk belongs to the government which employs them, their compensation is less than it would otherwise be. *The Cliton*, 3 Hagg. Adm. 117; *The Rapid*, Ib. 419; *The Thetis*, 3 Hagg. 14. In England the right of its vessels of war to sue as salvors, except in certain instances, is taken away by statute, unless the admiralty gives its consent. Merchants' Shipping Act of 1854, 17 and 18 Vict. ch. 104, § 484, *et seq.* The court took jurisdiction under this act, with the consent of the Lords of the Admiralty in the cases of *The Earl of Eglinton*, 1 Swabey, Adm. 7, and *The Mary Pleasants*, 1 Swabey, Adm. 224.

rule of practice which would prevent the officers and crew of our ships of war from claiming for any salvage service.<sup>1</sup>

In the first case in which salvage service was rendered in England by a steamer, or rather the first case in which salvage compensation was claimed for such service, not only was it admitted, but it was intimated that there is a special reason for inducing, by liberal compensation, vessels to render this service, which could do so with the greater efficiency from their comparative independence of wind and tide.<sup>2</sup>

<sup>1</sup> In this country, although it is very unusual for our ships of war to claim salvage, we know of no law which would prevent them from so doing. The act of December 22, 1837, ch. 1, 5 U. S. Stats. at Large, 208, authorizes the President to cause a suitable number of public vessels to cruise upon the coast in the severe portion of the season, to afford aid to vessels in distress. While engaged in such a service, we presume that they would not be entitled to claim any extra compensation; but we know of no law that would prevent their acting as salvors at any other time. This question has been several times considered by the attorneys-general of the United States, and opinions have been given to the following effect: In 1824, Mr. Wirt gave an opinion that a United States vessel was not entitled, as against government, to salvage for saving property of the United States, wrecked on Florida Reef. 1 Attorney-General Opin. 675. In 1849, Mr. Reverdy Johnson gave an opinion in favor of the right of an American vessel of war to claim salvage for assisting a French ship. 5 Attorney-General Opin. 116. In 1856, the question was presented to Mr. Caleb Cushing, whether the officers and crew of a coast-survey steamer had any right to receive and retain, for their own use salvage for assistance rendered to a merchant vessel of the United States. This

learned jurist doubted whether any compensation could be granted without the consent of the Executive. This doubt was founded on the language of Mr. Justice *Story*, in the case of *United States v. The Armistad*, 15 Peters, 518, 597, which was: "As to the claim of Lieutenant Gedney for the salvage service, it is understood that the United States do not now desire to interpose any obstacle to the allowance of it, if it is deemed reasonable by the court." The opinion was also given to the Secretary of the Treasury, that he might, by standing regulations, forbid the demand of salvage by any public ship, under the orders of the Treasury Department. 7 Attorney-General Opin. 756. See opinion of Mr. J. Nelson in the case of *The Josephine*, 2 Blatch. Q. C. C. 322. It may also be remarked, that by a United States statute (act of 1800, ch. 14, 2 U. S. Stats. at Large, 16) salvage is allowed national vessels for recapturing property of the United States. For cases under this act, see *The Schooner Adeline*, 9 Cranch, 244; *The Deer*, U. S. Dist. Ct. Mass. 2 Am. Law Review, 101.

<sup>2</sup> In *The Raikes*, 1 Hagg. Adm. 246, decided in 1824, which is said to be the first case in which a steam-vessel claimed salvage, Lord *Stowell* held that effective salvage services by steamboats should be encouraged, and awarded increased remuneration to the steamer,

If a part of the crew of a saving ship leave it and go on board the ship in peril, and carry her in, they who stay behind in the saving ship are salvors, or have a right to some salvage compensation, for their work is increased, and perhaps their safety lessened, by the absence of those who go. But this is usually not large, nor is it always given.<sup>1</sup> The owners of the saving ship have their

the case having been brought up on appeal from the decision of the commissioners appointed by the Lord Warden of the Cinque Ports. See also *Brooks v. The Wm. Penn, U. S. C. C., South Carolina*, 1 Am. Law Register, 584. If the service is merely one of ordinary towage, as a general rule only the usual towage compensation is to be given. *The Princess Alice*, 3 W. Rob. 138; *The Harbinger*, 20 Eng. L. & Eq. 641. Also see *The Albion*, 2 Hagg. Adm. 180, note; *The Graces*, 2 W. Rob. 294; *The Red Rover*, 3 W. Rob. 150. In *Stevens v. The Steamboat S. W. Downs*, 1 Newb. Adm. 458, where a steamboat towed another from the wharf to a place of safety, and thus prevented her coming in contact with another steamer on fire, it was held that she was not to be regarded as a salvor, but was entitled to greater compensation than a *quantum meruit*. In the very late case of *The Canova*, Law Reports, 1 Adm. & Ecc. 54, cited in 1 Am. Law Review, 313, the crew of a tug sued for salvage service, alleging that an agreement for towage service was invalid, because the fact that a great part of the crew of the vessel saved were ill was withheld. No danger to property was proved. Held, that there was no salvage service. See *The White Star*, Law Rep. 1 Adm. & Ecc. 68, cited in 1 Am. Law Review, 314; *The United Kingdom*, 3 Hagg. Adm. 401, note; *The London Merchant*, Ib. 394. In the *Meg Merrilies*, Ib. 346, the brig, being in a dismantled condition off the Land's

End, accepted the services of the *Saint Patrick* (on her voyage from Waterford to London, with a crew of twenty men), and was towed by her a distance of one hundred and five miles into Plymouth. The court awarded £ 750 and costs. *The Traveller*, Ib. 370; *The Earl Grey*, Ib. 363; *The Isabella*, Ib. 427; *The Reward*, 1 W. Rob. 174, 177; *The Kilby*, 26 Eng. L. & Eq. 596, note; *The Kingalack*, 1 Spinks, Adm. 263, 26 Eng. L. & Eq. 596; *The Medora*, 1 Spinks, Adm. 17; *The Charles Adalphe*, 1 Swabey, Adm. 153. In *The H. B. Foster*, Abbott, Adm. 222, *Bells, J.*, in delivering the opinion of the court, said: "I am not aware of any determinate rule of law which discriminates towage service from salvage. It is manifest that circumstances may exist rendering towage the most efficient, if not the only service, which can be afforded in saving property and life." *S. C. 1 Curtis*, C. C. 353; *The Independence*, 2 Curtis, C. C. 350.

<sup>1</sup> As a general rule, none can claim salvage who did not directly aid and participate in the salvage services, or promote those services by doing the work of those rendering them, as is the case with that part of the crew who are left behind. *The Vine*, 2 Hagg. Adm. 1. The claim of an officer of the coast-guard, who permitted his men to render assistance to a vessel, but did nothing himself, was in this case denied. See also *The Charlotte*, 3 W. Rob. 68; *Waterbury v. Myrick*, Blatchf. & H. Adm. 34. • And underwriters who em-

claim, and usually are allowed a considerable proportion of the salvage decreed.<sup>1</sup> One reason is, that the stopping and lying by the ship in peril constitute a deviation, and this avoids the insurance, unless it be for the purpose of saving life.<sup>2</sup>

If insurers employ a vessel to go to a ship which they have insured, and the vessel so employed renders to the imperilled ship services which would, if rendered by another vessel, be salvage services, the insurers are not entitled to salvage compensation.<sup>3</sup>

ploy a vessel to go to the assistance of property which they have insured are not entitled to claim as salvors. *The Pickwick*, 20 Eng. L. & Eq. 628. The claim of the admiral of a station is refused in case of recapture, unless he has the right by statute. *The Calypso*, 2 Hagg. Adm. 209. See also *The Thetis*, 3 Hagg. Adm. 14, 48, 58, 63.

<sup>1</sup> *The San Bernardo*, 1 Rob. Adm. 178; *The Jane*, 2 Hagg. Adm. 338; *The Salacia*, Ib. 262, 264; *The Martha*, 3 Ib. 434; *The Roe*, 1 Swabey, Adm. 84; *The Janet Mitchell*, Ib. 111; *The Perla*, Ib. 230; *Evans v. Ship Charles*, 1 Newb. Adm. 329; *The Baltimore*, 2 Dods. 132; *The Nathaniel Hooper*, 3 Sumner, 542; *Waterbury v. Myrick*, Blatchf. & H. Adm. 34. *The Henry Ewbank*, 1 Sumner, 400; *The Schooner Boston*, Ib. 328; *Mason v. Ship Blaireau*, 2 Cranch, 240; *Bond v. The Cora*, 2 Pet. Adm. 361. In *The Waterloo*, Blatchf. & H. Adm. 114, the vessel claiming salvage was bound from Havana to Cadiz. In lat. 34° N. 75° W. she found the *Waterloo*, a derelict, and with great difficulty and danger towed her into New York. Two thirds of the amount decreed was allowed the owners, on the ground that the risk was very great, and that the master and crew should not have imperilled property worth \$72,000 to rescue property worth \$40,000. In the following cases one half the amount decreed has been

allowed the owners: *The Columbia*, 3 Hagg. 428; *The Waterloo*, 2 Dods. 433. In *The Nicolina*, 2 W. Rob. 175, one fifth was allowed; in *The Hope*, 3 Hagg. Adm. 423, two fifths. In *the Albion*, 3 Hagg. Adm. 254, where a fishing-smack performed a salvage service, seven twentieths were given.

<sup>2</sup> There can be no doubt, at the present day, but that a deviation to save life on board another vessel is justifiable. See the case of *The Schooner Boston*, 1 Sumner, 328. See also *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Lawrence v. Sydebotham*, 6 East, 45; *The Ship Henry Ewbank*, 1 Sumner, 400; *Settle v. St. Louis Perpet. M. F. and L. Ins. Co.*, 7 Mo. 379; *Walsh v. Homer*, 10 Mo. 6.

<sup>3</sup> *The Pickwick*, 20 Eng. L. & Eq. 628. In this case a ship abandoned at sea was taken possession of by a small schooner, and, after being towed some time by the schooner, was boarded by several men from the President steamer, who took possession of her and towed her into Liverpool. The action on behalf of the President was entered in the names of certain persons, who, being the underwriters of the ship and cargo, hired the steamer for the purpose of saving the *Pickwick*. Dr. *Lushington*, in delivering the opinion of the court, said: "I shall allot to the *Agnes* £700; and with regard to the steamer I will only observe, that, with respect to Potter

C. *What is a Salvage Service.*

The peril from which the property is saved must be an extraordinary peril; and it must be one which exposes the property to destruction if the salvage service be not rendered.<sup>1</sup> If the ordinary means within the master's reach would have saved the property, he is bound to use them; and, in the absence of evidence, it will be presumed that he would have used them, and then the service rendered is not a salvage service. It might still give to those who rendered it a claim as for time and labor, but it has not the elements necessary to make it a salvage service in admiralty.<sup>2</sup> If these ordinary means, as the proper anchors, cordage, sails, or boats, are not in the master's reach, and the want of them exposes the vessel to impending destruction, thus making the salvage service necessary and meritorious, salvage compensation would be decreed. But the insurers would not be held liable to pay the amount decreed, if the salvage service was made necessary by the fault of the ship-owner in providing proper means of

& Co. and Rawson & Co. (the insurers), I do not allot one sixpence to them in their capacity as salvors."

<sup>1</sup> In *The Charlotte*, 3 W. Rob. 68, 71, it was held that it was not necessary "that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered."

<sup>2</sup> *The Elvira*, 1 Gilpin, 60, 67. This was a claim for salvage by the owners and crew of the pilot-boat *Leo*, for services rendered to the schooner *Elvira*, by which it is alleged that she was relieved from great danger and distress, and brought safely into the port of Philadelphia. The situation of the *Elvira*, at the time she fell in with the *Leo*, was, that her masts and rigging were gone, but they had replaced them

by jury masts and sails, under which she had navigated the ocean for three weeks, had been blown off the coast and returned to it, by the aid of which she would have safely entered the port of New York, but for a critical change of the wind, and with which she was at that moment making her way under a free sail to Cape Henry, her place of destination. *Hopkinson, J.*, in the course of his opinion, observed: "If goods are abandoned by those whose duty it was to take care of them, or if those persons are unable to preserve and protect them, it may be correctly said they owed their preservation to those who came to their aid; but it is difficult to maintain this proposition, when the proper guardians of the property remain with it, and have both the ability and inclination to protect it from loss or damage." Salvage was awarded the *Leo*.

safety. Indeed, the absence of these means or their inadequacy would, generally, constitute unseaworthiness. So, too, if the master had the means, but would not use them, then the salvage service would be necessary and must be compensated. But whether the insurers would be bound to repay it must depend upon whether the circumstances of the case did or did not make the master's fault a sufficient defence for them. And so it would be, even if the master wilfully imperilled the property to make some gain out of it. But it need not be said that if the salvors shared in the fraud, and conspired with the captain, they could have no claim. But the mere knowledge by them of the captain's fraud, with no participation in it, and no wrong-doing on their part, would not defeat their claim. It would, however, be sufficient wrong-doing on their part to defeat their claim, if they could have prevented the danger and did not.

The danger or distress from which the property is saved need not be extreme, and such as to make its destruction certain if not so saved; but it must be real and certain, and such as actually exposes the property to destruction. It is difficult to draw the line, and say that it is enough if this destruction be possible, or that more than this is necessary and it must be probable, or still more and it must be certain. Nor is it necessary to draw any such line; for admiralty will judge of each case rationally and equitably.<sup>1</sup> So it would be with the further rule, that, while no

<sup>1</sup> The Ship *Charles*, 1 Newb. Adm. 329, 336. In this case, a vessel and cargo, entirely derelict, were saved by the captain and pilot of the steamboat *Tiger*, which was employed by its owners in the business of towing vessels from the sea to port. The aids by which they were restored to safety was afforded in weather which was for the most part favorable to the salvors; yet it was given in time to save them from the probable consequences of a violent gale, which the towboat and her charge subsequently encountered while steering their course to the Balize, and which, in the opinion of the captain of the steamboat, would in all probability

have driven the saved vessel ashore in the course of the following night. On these facts, *McCaleb, J.*, in giving the opinion of the court, said that he would conclude his view of that part of the case then under consideration, "by a quotation from the able decision of Judge *Story*, in the case of *The Ewbank*, which I am induced to insert here by a remark which fell from the counsel of the respondent, to the effect that the ship was lying in the track of vessels passing to and from the Balize, and would in all probability have been discovered and brought in by some other vessel, if she had not been relieved by the *Tiger*. 'We are not,'



property would be held to pay salvage, unless it were saved,— which is obvious and certain,— when it came to the question whether it was saved by those claiming salvage compensation, it would be enough to entitle them to some compensation if their efforts or their exposure to danger actually contributed in some degree to the safety of the property.<sup>1</sup> In all cases where such questions arise, the court would exercise its discretion, first, in determining whether it was a salvage service at all, and then whether, while it called for some compensation, it merited only a slight one.<sup>2</sup>

says Judge *Story*, ‘to indulge mere possible conjectures on such subjects. The fact that she was saved is clear; the presumption that she might otherwise have been saved, during this long period, is mere matter of conjecture, *in nubibus*. It is not the habit of any court of justice to yield themselves up, in matters of right, to mere conjectures and possibilities; and least of all do courts of admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of court upon the suggestion, that, if they had not touched a derelict ship and cargo, the latter might in some way have been saved from all calamity, and therefore that the salvors have little or no merit.’” Salvage was awarded the *Tiger* to the amount of one ninth the value of the ship *Charles* and cargo.

<sup>1</sup> In the case of *The Bark Pandora*, 1 Newb. Adm. 438, it was held, that where the master of a vessel on fire gives authority to another to save what he can, and look to the property he may be able to save for his compensation, the person thus authorized is to be regarded in the light of a salvor, and is to be compensated as such out of the proceeds of the property saved. In *The Steamboat Pontiac*, 1 Newb. Adm. 130, it was held, that the fact that the exertions of the salvor alone did not save the boat,

she being finally saved by the particular manner in which the ice broke up, does not deprive him of the reward due a salvor, if he encountered the danger, and did all that could be done under the circumstances. Same case in 5 McLean, 359; *The Albion*, 3 Hagg. Adm. 254. In *The Ranger*, 9 Jurist, 119, a vessel negligently got upon the sands. Another vessel saw her, and, at much risk, crossed a shoal part of the sands, and hastened to her assistance; but before she arrived the first vessel got off. The court held that, as no actual salvage service was rendered, the vessel could not claim salvage; but as she was induced to go to the assistance of the one on shore when she was in danger, and as the danger was occasioned by negligence, the vessel was entitled to the expenses she had incurred. See also *The E. U.*, 1 Spinks, Adm. 63; *The Sentipore*, Ib. 281.

<sup>2</sup> *Stephens v. Bales of Cotton*, Bee, 170. See also *The Jonge Bastiaan*, 5 Rob. Adm. 322; *The Elenor*, 2 Hagg. Adm. 3; *The Wart*, 2 W. Rob. 70; *The Clifton*, 3 Hagg. Adm. 117. In *The Rapid*, 3 Hagg. Adm. 419, it was held that ships of war assisting British merchantmen were entitled to salvage for important services, but *aliter* if slight and not promptly demanded. *The Thetis*, 3 Hagg. Adm. 14. If a vessel at sea is

*D. On what Property is Salvage allowed.*

Generally, on all maritime property and interests, as ship, short-handed by reason of sickness, and is navigated into port by part of the crew of another vessel, this is to be treated as a salvage service. *Williamson v. Brig Alphonso*, 1 Curtis, C. C. 376; *The Active*, 1 Eng. L. & Eq. 644; *The Roe*, 1 Swabey, Adm. 84; *The George Nicholas*, 1 Newb. Adm. 449, where it was held that when a vessel at sea meets with another, on board of which the greater part of the crew are dead, and the rest rendered entirely helpless by disease, it is the duty of the master of the first vessel to interrupt his voyage to take the necessary steps to preserve the lives of the sick, "imposed by natural law, and the commands of Christianity." In *The Janet Mitchell*, 1 Swabey, Adm. 111, a vessel was met with in distress, her captain having been drowned, and some one was required to manage her. The mate of the vessel volunteered his services, and the vessels reached their ports in safety. Salvage was allowed to the owners, master, and rest of the crew. But when salvors found a ship derelict, and went on board, and in their haste forgot to take with them a log-glass, a watch, and a chart, it was held that the officer of a king's vessel, who was afterwards requested to supply these articles, payment being offered, was not entitled to salvage on the ground that they could not bring the vessel safely to port without his assistance. *The Blenden Hall*, 1 Dods. Adm. 414, 419. In *The Mary*, 1 W. Rob. 448, the master and part of the crew had been taken by pirates, and the vessel, at the time she was discovered by the alleged salvors, was in the offing, with a signal of distress flying. They went out to her and brought her safely in, and afterwards joined in an expedition against the pirates. The master and crew were ransomed, and then the pirates attacked. The court held that salvage was only due for conducting the vessel into harbor. Compensation has been granted for keeping near a vessel — which, though distressed, was not in any immediate danger — at the earnest request of her captain. *Allen v. Ship Canada*, Bee, 90. In *the Westminster*, 1 W. Rob. 229, where a vessel was stranded near her port of destination, and it became necessary to transship the cargo, which was done, this was held to be a salvage service. So where a vessel in distress was boarded at some risk by a fishing-smack, and an order for a steamer taken, compensation as salvage was decreed. The value of the ship, cargo, and freight was £10,500, and £40 were allowed. *The Ocean*, 2 W. Rob. 91. In *George v. Ship Arctic*, Bee, 232, the court gave compensation in the nature of salvage for services which fell below those necessary to found a strict salvage claim. In the case of *Williams v. Box of Bullion*, U. S. Dist. Ct. Mass., 6 L. Rep. 363, where some shipwrecked mariners were taken from a ship which had rescued them, and they brought with them a bag of gold, which was taken on board the vessel to which they were transferred, it was held that, although this last vessel was not entitled to claim salvage, the persons and property being in no danger at the time, yet a compensation was due beyond mere freight money. In *A Raft of Spars*, Abbott, Adm. 485, salvage was awarded for rescuing a raft of timber which was floating out to sea.

cargo, and freight.<sup>1</sup> It is allowed on public property;<sup>2</sup> but there are some exceptions here not well settled, as in respect to the mails,<sup>3</sup> and to a ship-of-war, domestic or foreign.<sup>4</sup> But these questions can seldom if ever reach insurers, and need not be here considered. As a general rule, wherever a court of admiralty could take jurisdiction, it would enforce a salvage claim.<sup>5</sup>

One distinction should be pointed out, as it might affect insurers directly. If ship and cargo are exposed to a common peril, and saved together by a common salvage service, they are considered as one property; that is, the valuation of the one is added to that of the other (or their proceeds if sold under decree), and the salvage decreed is a percentage of the whole.<sup>6</sup>

<sup>1</sup> In *The Peace*, 1 Swabey, Adm. 85, where an action was entered against a vessel and her freight, but, as the cargo had been delivered, only the vessel was arrested, and bail was given for both ship and freight, the court held that the owners of the vessel were bound to bring in an account of freight on oath, and to set forth when, and the names of the parties by whom, such freight had been paid.

<sup>2</sup> *The Lord Nelson*, Edw. Adm. 79; *The Marquis of Huntly*, 3 Hagg. Adm. 246; where a ship with government stores was saved with great exertions, and salvage was allowed.

<sup>3</sup> *Schooner Merchant*, cited in *Marvin on Salvage*, 132.

<sup>4</sup> *The Schooner Exchange v. M'Faddon*, 7 Cranch, 116. *L'Invincible*, 1 Wheat. 238.

<sup>5</sup> In *The Prins Frederick*, 2 Dods. 451, this question was discussed at length, but no decision was given, as the foreign government afterwards consented that the judge of the Admiralty Court might determine the amount of salvage due.

<sup>6</sup> *The Vesta*, 2 Hagg. Adm. 189. Here the ship, on a voyage from Memel to London, stranded on the Gunfleet Sand. Salvage was effected, and the

award of the magistrates at Colchester had allotted two thirds of the value of the ship; one fourth of the deals forming part of the cargo, and one third of the corn on board; giving all together two fifths of the proceeds, — about £ 1,000. Sir *Christopher Robinson*, referring to the award of the magistrates, in delivering the opinion of the court, remarked: "It is said that it might be made with reference to the difference of danger to which the property was exposed; but that would be a difficult criterion to be applied in most cases. The buoyancy of articles may vary in different places, in the sea or in the river; and on the high seas the consequence may not be very different to the owner whether the articles sink or float away. It might be adopted on a computation of the difference of labor employed in the constant attempts to float the ship, which were ineffectual for so long a time, and the comparative facility of floating the deals; but I do not think that would be a safe criterion in general cases. Suppose, for instance, a casket of jewels on board, and which might be saved with great facility; it could not in such a case be contended that the salvors would only be entitled to a small gratuity for carrying it on shore. To up-

But the cargo may be saved by itself. And that part of the cargo which belongs to one shipper may be saved by itself, and not that of others. Or the goods belonging to only one shipper may alone need or receive the salvage service. In any such case, the claim would attach only to the property saved by the salvage service.<sup>1</sup>

There has been much discussion whether and when an agreement between the master of the imperilled ship and those rendering assistance bars their claim as for a salvage service. Perhaps the best conclusions to be drawn from the cases are, first, that an agreement with respect to the service to be rendered, and the compensation to be paid, will not be disregarded in admiralty; second, that the courts do not regard with favor an agreement which is set up to oust them in part of their jurisdiction; and, third, that such an agreement will be permitted to prevent the court from decreeing the compensation merited by great efforts or courage and exposure, or from limiting the compensation until it bears a due proportion to the merits of the case, *only* when the agreement is itself just and reasonable, clear and explicit in its terms, made with entire honesty on both sides, with a sufficient knowledge and consideration of the facts which should have been regarded. Then such an agreement, being, in the old phrase, “*omni suspicione major*,” will be respected, even if it bears with some hardness upon one or the other party.<sup>2</sup>

hold such a notion would lead to preferences in saving one part of a cargo before another. The more usual rule has been to make a valuation on the ship and cargo, and I think that would be the more convenient practice.”

<sup>1</sup> *Stephens v. Bales of Cotton*, Bee, Adm. 170; *The Vesta*, 2 Hagg. 189; *Montgomery v. The Steamboat T. P. Leathers*, 1 Newb. Adm. 421.

<sup>2</sup> *The True Blue*, 2 W. Rob. 176 – 179. In this case there was an agreement between the master of the vessel saved and the salvors. In the course of its opinion the court observed: “I entertain no doubt whatever, that an agreement of this description can be legally made between a master of a vessel in distress and persons affording

a salvage assistance, provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves. Such an agreement, I feel no hesitation to pronounce, would be a binding instrument, not to be disturbed by a judgment of this court. On the contrary, it would be the duty of the court to enforce the fulfilment of such an agreement.” In *The Henry*, 2 Eng. L. & Eq. 564, Dr. *Lushington* held, that, where the master of a ship in distress agreed with the salvors to pay them a certain sum for their services, the agreement would be upheld as against the salvors,

It is now quite certain that gross misconduct on the part of the salvors connected with the property saved forfeits all claims for salvage.<sup>1</sup> This is especially true of embezzlement of the cargo. The whole purpose of the law of salvage is to reward and encourage the saving of imperilled maritime property. And there would seem to be no stronger reason for denying salvage than any depredation upon the property. And this reason is strength-

unless fraud could be proved against the master. *The Resultalet*, 22 Eng. L. & Eq. 620. In *The William Lushington*, 7 Notes of Cases, 361, an agreement or understanding between the owners of the vessel saved and the owners of a cutter engaged by them to render the service (no specific sum being fixed therein) was held to bar the parties suing (including the master and crew of the cutter) who acted in the service under the personal direction of the owner of the cutter, but were not parties to, or cognizant of, the understanding. In the case of *The Salaria*, 2 Hagg. Adm. 262-265, where the captain of the saving ship was reported to have said "that he should not demand any salvage, but that his crew would not work unless paid for their labor, and that they declined to take a dollar a day, but would accept two," the court refused to give consideration to loose conversations of this kind. *The Firefly*, 1 Swabey, Adm. 240. In this case Dr. *Lushington*, in delivering the opinion of the court, held, that where an agreement for salvage services is clearly established, the court will uphold it, unless wholly inequitable, and will not set it aside on the ground that it is a hard bargain. See also *Bondies v. Sherwood*, 22 Howard, 214.

<sup>1</sup> *The Joseph Harvey*, 1 Rob. Adm. 306; *The Bello Corrunes*, 6 Wheat. 152; *The Clarisse*, 1 Swabey, Adm. 129, 133; *The Charles Adolphe*, 1 Swabey, Adm. 153; *The Perla*, 1 Swabey, Adm. 230;

*The Bark Island City*, 1 Black, U. S., 121. This was a libel for salvage by the owners of the steamer *Westernport*, against the bark *Island City*. The latter, on her voyage from Galveston to Boston, being in distress off Cape Cod, was taken in tow by the *Westernport* and brought into Hyannis. While the *Island City* was in possession of the *Westernport*, the officers and crew of the latter vessel broke open the chests of the master and seamen of the bark, and robbed them of their clothes, watches, etc., etc. Mr. Justice *Grier* held, that "a right to compensation for salvage presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors. If salvors are guilty of embezzlement, whether at sea or in port, or even after the property has been delivered into the custody of the law, their claim for salvage is forfeited to the owners. The operation of this rule does not depend on the amount or value of the property embezzled; the law visits any embezzlement, though small, with an entire forfeiture of all claim for salvage. Where the embezzlement is secret and purely an individual act, it will not prejudice co-salvors, who are innocent and ignorant of it; but all are guilty who consent to, connive at, or conceal it, — who encourage it, or fail to prevent it when they can."

ened by the fact that the property is so absolutely within the power of the salvors, with no protection whatever but that which the law can give to it.

But this forfeiture reaches only the guilty individuals, and does not affect innocent co-salvors.<sup>1</sup> But if it be the master who has embezzled the property, and he is also part owner, he forfeits his share in both capacities.<sup>2</sup> It has even been contended that the master is so far the servant of the owners that they are responsible for his wrong-doings, and that his embezzlement of the cargo forfeits their share. But it seems to be the rule of admiralty that only the parties who are actually guilty shall be punished.<sup>3</sup> In one case in Massachusetts, the share of a salvor was diminished, because of some carelessness whereby others were enabled to plunder the vessel.<sup>4</sup> So, too, all oppression or attempts at extortion, or exaggeration of the service rendered, are punished by the court by forfeiture or diminution of salvage.<sup>5</sup>

Salvors are witnesses in their own case, because for the most

<sup>1</sup> *Mason v. Ship<sup>2</sup> Blaireau*, 2 Cranch, 340.

<sup>2</sup> *The Schooner Boston*, 1 Sumner, 328. This was a suit for salvage by the master and owners of the schooner *Magnolia*. Embezzlement was proved against the master, who was also part owner, and the mate; and it was held that this forfeited the claim of the master of the *Magnolia*, both as master and part owner, also that of the mate. *Story*, J., in delivering the opinion of the court, observed: "The maritime law demands from all persons engaged in maritime concerns scrupulous good faith and uprightness of conduct. And it prescribes this most emphatically to salvors, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence. But in cases of embezzlement the law would fall short of its usual foresight if it did not inflict a more admonitory punishment. Accordingly it will be found, I believe, in the maritime jurisprudence

of the whole world, that embezzlement by salvors, directly or by connivance, is punished by a forfeiture of all claim to salvage. In morals, in general justice, and in sound policy, it should be so."

<sup>3</sup> *The Rising Sun*, Ware, 385, where it was held that embezzlement by a salvor works a forfeit of his claim of salvage, but does not prejudice his co-salvors who are innocent; and that if the master and all the crew are implicated in the embezzlement, it will not work a forfeiture of the share of the innocent owners of the salvor ship.

<sup>4</sup> *The John Perkins*, 19 Law Rep. 496.

<sup>5</sup> *Houseman v. Schooner North Carolina*, 15 Pet. 40; *The Susannah*, cited 3 Hagg. Adm. 345, note; *The Giacomo*, 3 Hagg. Adm. 344; *The Rising Sun*, Ware, 378; *Schooner Boston*, 1 Sumner, 328; *Ship Octavia*, cited in Marvin on Salvage, 113; *The Elizabeth & Jane*, Ware, 85, 37; *The Towan*, 2 W. Rob. 259.



part they alone know the facts. But where this reason wholly fails, because the facts can be proved as well by other and disinterested witnesses, their testimony is not, generally at least, received.<sup>1</sup> From the fact that they are thus permitted to testify, from necessity, it has been, we know, earnestly contended, that false testimony from any of them should forfeit their shares. The truth of the case is in their keeping as much as the goods are, and they are permitted to testify because it is; and an embezzlement of the truth, for so falsification of evidence may be considered, should have the same effect as embezzlement of property. But we are not aware of any direct authoritative decision on this point.

### SECTION IX. — *Of the Amount of Salvage decreed.*

THIS is always and entirely within the discretion of the court. It is never regarded as mere compensation for time and labor, or as only wages, but as a reward, intended to stimulate all who come within reach of endangered maritime property to do all that can possibly be done to save it. Hence, the courts are very liberal in cases of exposure to peril or suffering on the part of salvors, and always reward largely great courage in encountering dangers, and persistent efforts to save the property, not only in defiance of peril, but with much exposure to suffering.

It is impossible to state any rules which may serve as the constant measure of salvage. And it ought to be so, for it is far better that each should be determined on its own facts and merits.<sup>2</sup> One effect of this may be noticed. In cases of salvage

<sup>1</sup> The Schooner Boston, 1 Sumner, 328, 345. In this case *Story, J.*, observed: "The constant course of practice has been, in salvage cases, to allow the testimony of the salvors to be taken as to the facts occurring at the time of the salvage service, and especially where these are exclusively within their knowledge. Of course the evidence being of interested persons is in the nature of semi-plenary evidence only, and will weigh little, unless corroborated by other circumstances. It will be of less weight when it leaves behind it

disinterested testimony which might be taken; and it will be greatly abated in force by opposing testimony from persons belonging to the crew of the saved ship." See also *The Ship Henry Ewbank*, 1 Sumner, 400.

<sup>2</sup> *Bond v. The Brig Cora*, 2 Wash. C. C. 80. This was a libel for salvage filed by the owners, master, and crew of the brig Ceres. *Washington, J.*, in giving the opinion of the court, remarked: "In appreciating and properly rewarding such services, no rule but that which a sound discretion may sug-

on our Western waters, the rates of compensation decreed are said by the courts to be less than those of the Eastern courts, because the peril of life is generally much less in disasters on inland waters than on the ocean.<sup>1</sup> At the same time, there are, and perhaps always have been, certain principles or usages which guide the courts.

These vary from time to time. Thus, it was formerly almost a rule, certainly a very general custom, to give to salvors half of the property they saved, when the property was *derelict*. This word means "abandoned," and is used in the law of admiralty to signify maritime property which all who had charge and possession of have left and utterly deserted, whether voluntarily or by compulsion. So long ago as in 1798, Lord Stowell declared this rule to be "obsolete."<sup>2</sup> And as far as we can judge from recent cases, we should not expect that admiralty, either in England or in this country, would give so much as one half, in a case even of unquestionable derelict, unless there were some grounds for peculiar liberality, as danger to property or person bravely encountered, or severe and continued labor and exposure.<sup>3</sup>

gest, upon a view of all the circumstances of each particular case, can be laid down." In the case of *Post v. Jones*, 19 How. 150-161, which was a case of salvage, Mr. Justice Grier delivered the opinion of the court, in the course of which he observed: "Where it is not fixed by statute, the amount of salvage must necessarily rest on an enlarged discretion, according to the circumstances of each case. The case before us is properly one of derelict. In such cases it had frequently been asserted, as a general rule, that the compensation should not be more than half nor less than a third of the property saved. But we agree with Dr. *Lushington* (*The Florence*, 20 Eng. L. & Eq. 622), 'that the reward in derelict cases should be governed by the same principles as other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service'; and that 'no valid

reason can be assigned for fixing a reward for saving derelict property at a moiety, or any given proportion; and that the true principle is adequate reward, according to the circumstances of the case.' See also *The Thetis*, 2 Knapp, 410.

<sup>1</sup> *McGinnis v. Steamboat Pontiac*, 1 Newb. Adm. 130, 5 McLean, 359-368. In this case, in the course of his opinion, *Leavitt, J.*, observed: "It may not be improper here to remark, that, in salvage claims arising on the Western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation, cannot be safely adopted. In general, the peril of life, in cases of disaster on our rivers, affording a claim for salvage service, is not equal to those resulting from disasters on the ocean."

<sup>2</sup> *The Aquila*, 1 Rob. Adm. 37-45.

<sup>3</sup> The position seems now to be established that the reward in derelict

More than half has been, and may be, given in extraordinary cases.<sup>1</sup> But the amount decreed may be anything less, down to mere wages, or a very slight compensation. It is still a general rule, that where the property is large, and a smaller proportion necessarily amounts to a large sum, the proportion given is smaller than where the property saved is small.<sup>2</sup> In a recent case, the Supreme Court of the United States have said that great distance

cases should be governed by the same principles as in other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service. *The Florence*, 20 Eng. L. & Eq. 607. This doctrine was assented to in *Post v. Jones*, 19 How. 150, 161, but a moiety was nevertheless allowed. In *Rowe v. Brig* —, 1 Mason, 372, 377, Mr. Justice Story considered the old rule of giving a moiety, in case of a derelict, as a subsisting but flexible rule; but the doctrine first above given was early asserted in this country. *Flinn v. The Leander*, Bee, Adm. 260. And it may still be taken as the prevailing disposition of admiralty courts, or, as has been said, as the general sense of the maritime law, that salvage on derelict should not in ordinary cases go below a third, and never or almost never above one half. *Tyson v. Prior*, 1 Gallis, 133, 136; *Rowe v. Brig* —, 1 Mason, 372, 377; *Post v. Jones*, 19 How. 150, 161; *The Frances Mary*, 2 Hagg. Adm. 89; *The Reliance*, 2 Hagg. Adm. 90, note; *The Effort*, 3 Hagg. Adm. 165, 167; *The Elwell Grove*, 3 Hagg. Adm. 209 – 221. We are, however, of opinion that English and American courts would now hesitate to give so much as half, unless in cases of unquestionable derelict, nor even then, unless there were in the case peculiar circumstances of exertion, peril, or merit. See *The Minerva*, Spinks, Adm. 271. *The Schooner John Wurtz*, Olcott, Adm. 462.

<sup>1</sup> The rule of a moiety was formerly applied much more severely against the owners of the saved property, though it was seldom exceeded. *Sprague v. Barrels of Flour*, 2 Story, 195; *The Britannia*, 3 Hagg. Adm. 153. Yet where the property was of small account, and the labor great, it has been held otherwise, and more than a half given. *The Jonge Bastiaan*, 5 Rob. Adm. 322; *The Jubilee*, 3 Hagg. Adm. 43, note; *The Waterloo*, Blatchf. & H. Adm. 114; *The William Hamilton*, 3 Hagg. Adm. 168 and note. In the last case, where a vessel had been found derelict, the wreck was sold by order of the customs, and the net profits, after paying outport expenses, paid into the registry. There was no appearance for the owners. The court awarded £35, the balance, after all costs, to be paid to the salvors.

<sup>2</sup> *The Ship Henry Ewbank*, 1 Sumner, 400, 412; *The Earl of Eglinton*, 1 Swabey, Adm. 7; *The Blenden Hall*, 1 Dods. 414, 421; *The Waterloo*, 2 Dods. 433, 442; *The Vesta*, 2 Hagg. Adm. 189; *Tyson v. Prior*, 1 Gallis, 133. In *The Ocean*, 3 Hagg. Adm. 194, where an anchor and a chain-cable, together with a buoy and buoy-rope, of the value of £20, were found by some mariners who had gone in search of anchors, etc., the court decreed two fifths, after deducting expenses. This suit was brought to determine the amount due in similar cases, and may be considered as a leading case.

from the home port is a circumstance which would justify a more liberal allowance for salvage.<sup>1</sup> It is said, on high authority, that the Court of Admiralty has no power to decree salvage merely for saving life.<sup>2</sup> We should be reluctant to admit this as a rule, unless where no property is saved; and then, of course, there can be no salvage, because that means a proportion of the property saved. But when property is saved, and the question of amount of salvage arises, there is no argument for enlargement more operative upon the court than one founded upon earnest and meritorious efforts to save life.

#### SECTION X. — *Of the General Clause respecting other Perils.*

THERE is nothing in the law of insurance which prevents parties from agreeing upon insurance against other perils than those usually enumerated, and specifying them in the policy. But the general clause which is usually inserted against "all other risks and perils," enlarges the scope and operations of the policy very little, because, by a common principle of construction (that general words are restrained by the particular recital),<sup>3</sup> it is always construed to mean other perils of like nature or character with those enumerated, which would therefore be included, generally at least, in the other clauses. But these words have been declared by courts to be material and operative, and insurers have been held liable under them; although, as it seems, in most of these cases they might have been held liable as well under other clauses.<sup>4</sup> It

<sup>1</sup> *Port v. Jones*, 19 How. 150.

<sup>2</sup> *The Zephyrus*, 1 W. Rob. 329, 331. This was a claim for salvage for rescuing the master and crew, the vessel itself not having been saved. Dr. *Lushington*, in delivering the opinion of the court, observed: "The jurisdiction of the court in salvage causes is founded on a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life."

<sup>3</sup> 2 Rolle, Abr. 409; *Payler v. Homersham*, 4 M. & S. 423; *Moore v. Ma-*

*grath*, 1 Cowp. 9; *Rich v. Lord*, 18 Pick. 322; *Jackson v. Stackhouse*, 1 Cowp. 122.

<sup>4</sup> In *Cullen v. Butler*, 5 M. & S. 461, the vessel was lost by being fired into through mistake. Held, that the loss was covered by the general clause. Lord *Ellenborough*, C. J., said: "The extent and meaning of general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the

has been held that an extraordinary duty laid on goods at the port of destination, between the time of the capture of a vessel and her release and arrival, is not covered by an insurance against

effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." The following have been held to be covered by the general clause. Damage done to a vessel while in a graving dock for repairs, by being blown over by the wind. *Phillips v. Barber*, 5 B. & Ald. 161. Or by the explosion of the boiler. *Perrin v. Protection Ins. Co.*, 11 Ohio, 147. Or while the vessel is being hauled up on a marine railway, and is partly in the water and partly on land. *Ellery v. New England Ins. Co.*, 8 Pick. 14. Injury sustained by the accidental breaking and giving way of the tackle and supports whereby the vessel was supported in being moved from a dock where she had been hauled up for repairs. *Devaux v. J'Anson*, 5 Bing. N. C. 519. So dollars thrown overboard to prevent their falling into the hands of the enemy, one of the perils enumerated being jettison, which was considered as not confined to the signification it has in general average, but as meaning any casting overboard *ex justa causa*, are protected by this clause. *Butler v. Wildman*, 3 B. & Ald. 398. So, it would seem is loss by barratry committed by one part owner against another, or against any other party in interest. *Per Martin, B.*, *Jones v. Nich-*

*olson*, 10 Exch. 28, 26 Eng. L. & Eq. 542. In *Moses v. Sun Mut. Ins. Co.*, 1 Duer, 159, it was held that a loss occasioned by the sale of a part of a cargo of provisions to pay for necessary supplies at an intermediate port, and the necessary consumption of the rest by the passengers and crew, owing to the want of a proper supply on board the ship, was not covered by this clause. Mr. Justice *Duer* said: "The words of the general clause, broad as they are, in this as in many analogous cases, are limited in their application by the specification that immediately precedes them, and therefore have their due effect assigned to them, by allowing them to comprehend and cover only such other cases of marine damage as are of the like kind (*ejusdem generis*) with those specifically enumerated, and are occasioned by similar cases." In *Caldwell v. St. Louis Perpet. Ins. Co.*, 1 La. Ann. 85, the policy contained this clause, insuring against "all other perils, losses, and misfortunes which shall come to the damage of the said boat, according to the general law of insurance." Held, that this covered a loss by a collision produced by the negligence of the officers of another boat. In *Perkins v. New England Mar. Ins. Co.*, 12 Mass. 214, a license was insured, "not only against capture, but against its being destroyed or rendered useless, by the ordinary perils of the seas, fire, or otherwise." The ship was afterwards boarded, the license was indorsed by a British officer, and thus rendered useless. Held, that there was a loss within the policy.

“all unavoidable perils, losses, and misfortunes to the damage of the goods,” — the loss being occasioned by a political event not insured against.<sup>1</sup> Courts have been disposed to construe “against all risks,” when written and not printed, as an insurance against everything but the fraud of the assured; but it may be doubted whether, in practice, even this phrase should be permitted to extend its operation quite so indefinitely.<sup>2</sup>

The general clause may also sometimes depend for its construction on the intention of the parties as manifested in the express declarations of the policy. Thus, where a vessel was insured “while being safely launched,” and the policy enumerated the ordinary perils as in a marine policy, “and all other sea perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said vessel, or any part thereof, not arising from negligence, fraud, ignorance, or misconduct of the master,” it was held, that the insurers were liable for the expenses incurred in launching the vessel after she had stopped on the ways, and was in a condition of great danger, not owing to any fault on the part of the assured or his agents.<sup>3</sup>

#### SECTION XI. — *Of excepted Risks and Losses.*

As nothing prevents the parties from extending the contract of insurance at their own pleasure, so they may limit it as they think proper, by expressly excepting, or, which is the same thing, warranting against some of the perils usually insured against. The most usual exception relates to illicit or prohibited trade. This is not the same with contraband trade, although the words are

<sup>1</sup> De Peau v. Russell, 1 Brev. 441.

<sup>2</sup> In Goix v. Knox, 1 Johns. Ca. 337, the court said: “This expression is vague and indefinite, but if we allow it any force, it must be considered as creating a special insurance, and extending to other risks than are usually contemplated. We are inclined to give it a liberal construction, and apply it to all losses, except such as arise from the fraud of the assured.” See also Skidmore v. Deadoity, 2 Johns. Ca. 77. In

Marcy v. Sun Mutual Ins. Co., 11 La. Ann. 748, insurance was effected on a floating dock against “all risks.” It was held that this term meant all river and harbor risks, so far as they were applicable to floating docks, and that evidence as to the general meaning of the phrase was not admissible, it not being shown to be so used in reference to floating docks.

<sup>3</sup> Fritchette v. State Mut. Ins. Co., 3 Bosw. 190.



sometimes used as if synonymous; for, as has been seen, it is not against the law, either of nations or of any neutral nation, for its subjects to break through a blockade, or supply a belligerent, if they can; they take the risk of capture for so doing, but if they please they may encounter that risk. Illicit or prohibited trade, on the contrary, is one which cannot be carried on without a distinct violation of some positive law of the country where the transaction is to take place. Of course such trade, or an attempt at such trade, exposes the guilty party to the consequences of it, which are usually seizure and condemnation. But no loss by forfeiture for such cause throws any responsibility on the insurers, if there be an exception of this risk, or a warranty against it, as is the case in many American policies; because such an exception at once intimates that the insured expects to attempt such trade, and agrees to stand his own insurer against its peril. It should be noticed, however, that this exception relates only to the property insured in the same policy, and not to other goods in the same ship; for if there be this warranty against "loss by illicit trade," and both insurers and insured know that other goods than those covered by the policy are on board, which other goods are contraband, and the ship and cargo are seized, condemned, and lost, on account of these other goods, the insurers are still held, because this warranty is to be read as if it were against "loss by illicit trade in the goods hereby insured."<sup>1</sup>

This exception may give rise to three classes of questions: one where there has actually been this excepted trade and a consequent forfeiture; one where there has been an attempt at such a trade, never carried into effect, but followed by a seizure and condemnation for the attempt; the third where there has been neither the trade nor an attempt at the trade, but nevertheless a seizure and condemnation, grounded on an alleged violation of law, but not justified in fact. In the first case the insurers are certainly exonerated. In the second, they are exonerated where the seizure and condemnation were legal and justifiable by reason of any endeavor to do the thing embraced within the exception or

<sup>1</sup> *Cucullu v. Orleans Ins. Co.*, 18 Mart. La. 11, 13. In *Bowne v. Shaw*, 1 Caines, 489, both parties knew that other goods were on board, which were illicit, and the underwriters were held. So in *De Peyster v. Gardner*, 1 Caines, 492, where the underwriters knew the fact, but the insured did not.

warranty. In the third case, the insurers are not exonerated. That they are not liable for the consequences of an attempt to do that which is not done, if they would not be liable if the thing were done, seems to follow from the fact that the insured take upon themselves, by the exception, *all* the risks springing from the trade, and it is fair to say that a peril arising from an attempt to enter into it is one of them.<sup>1</sup> On the other hand, if the property is lost by the illegal and unjustifiable conduct of a foreign court, this is a loss which the insurers cannot say arose from a prohibited trade, when there never was any such trade and no attempt at it; for the insurers have no right to defend themselves under a false pretence, merely because a foreign court have defended themselves under that same false pretence;<sup>2</sup> and the same principle applies to an exception of breach of blockade.<sup>3</sup>

<sup>1</sup> *Church v. Hubbard*, 2 Cranch, 187; *Higginson v. Pomeroy*, 11 Mass. 104. See also *Smith v. Delaware Ins. Co.*, 3 Wash. C. C. 127. It has so been held also where the vessel was not allowed to enter her port of destination. *Smith v. Univ. Ins. Co.*, 6 Wheat. 176; *Suydam v. Mar. Ins. Co.*, 1 Johns. 181; *Speyer v. New York Ins. Co.*, 3 Johns. 88. In *Tucker v. Jubel*, 1 Johns. 20, the government of Antigua had given permission for American vessels to export sugar on certain conditions. These were complied with, and the vessel began to load. After the conditions

were complied with, but before she began to load, the permission to export was revoked. The president of the island gave an opinion that vessels which had complied with the conditions might be cleared with their sugar. This was done in the present case, but the vessel was captured and the cargo condemned for a breach of the laws of trade. Held, that the president had no authority to so interpret the law, and that the underwriters were not liable.

<sup>2</sup> Mr. Justice *Story*, in *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, states the law as follows: "A seizure or deten-

<sup>3</sup> In *Yeaton v. Fry*, 5 Cranch, 335, a vessel was insured "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk," against all risks, blockaded ports and Hispaniola excepted. The vessel sailed for a port which was then blockaded in fact, although this was not known when she sailed. Being warned off, the master directed his course for Norfolk, but on the way the vessel was plundered by a French privateer, and ordered to St. Domingo for trial. The under-

writers were held liable. In *Radcliff v. United Ins. Co.*, 7 Johns. 38, 9 Johns. 277, the policy contained this clause: "The insurers take no risk of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded." The vessel was taken and condemned for a breach of blockade. Held, that it made no difference whether this seizure was legal or illegal. See *Laing v. United Ins. Co.*, 2 Johns. Ca. 174, 487; *Johnston v. Ludlow*, 2 Johns. Ca. 481, 1 Caines, Ca. xxix.

There must be an actual seizure to bring a case under this exception or warranty. Neither an attempt at a prohibited trade, nor the actual trade, will suffice without seizure for it.<sup>1</sup> In some

tion, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention not *bona fide* made upon a just suspicion of illicit or contraband trade. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries, and this is what the law deems a legal and justifiable cause for the seizure or detention. . . . No seizure or detention, not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations must be deemed within it." It was therefore held that if the seizure was *bona fide* and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, were not necessary to discharge the underwriters.

But if "there was a mere lawless seizure or detention under the pretext of illicit or prohibited trade, and it was utterly unfounded and without any reasonable cause of suspicion, and was used merely as a pretence to cover an intentional fraud or tort, then the seizure or detention was not such as is contemplated in the clause." Per *Story, J.*, in *Bradstreet v. Neptune Ins. Co.*, 3 Summer, 600, 615. See also *Magoun v. New England Mar. Ins. Co.*, 1 Story, 157.

<sup>1</sup> *Graham v. Pennsylvania Ins. Co.*, 2 Wash. C. C. 113, 120. *Washington, J.*, in this case, said: "An illicit trade unaccompanied by a seizure, or an un-

founded seizure for a supposed illicit trade, where none took place, will not affect his (the assured's) right to recover." In *Kohn v. New Orleans Ins. Co.*, 12 La. 348, the policy contained the usual clause. There was a general law of Mexico prohibiting the exportation of bullion. The insurance was on bullion from any part in the Gulf of Mexico to New Orleans. The vessel put into Tampico in distress, and was totally lost. Part of the bullion was shipped to Mobile, and the rest was sunk in shallow water with a view to its recovery. The underwriters were held liable. In *Smith v. Delaware Ins. Co.*, 3 S. & R. 74, goods were insured from Baltimore to Hamburg, with liberty to touch at Toningén, warranted American property, with the usual clause in regard to illicit trade. The vessel was seized off Cuxhaven by the French, and carried to Hamburg, and the cargo condemned by Napoleon in person. At the time of the seizure, the French forces had command of the Elbe, but the senate of Hamburg continued to exercise its functions, and there was an American consul at Hamburg. *Tilghman, C. J.*, said: "There must be both a seizure and an illicit or prohibited trade. It is not enough that a seizure is made on an allegation of prohibited trade. It must be proved that there was a prohibition, and that the case is within it. And it must be a legal prohibition, such as the prohibiting power had a right to make." It was held, that the temporary occupation by a belligerent of a neutral country, without dissolving the government, did not give the occupant the right to make municipal

policies, capture and seizure of any kind are expressly excepted,<sup>1</sup> or the insurers assume the risk while the vessel is at sea, but not

regulations of which other nations were bound to take notice. And that a seizure for breach of such regulation was not within the exception. See *Donaldson v. Thompson*, 1 Campb. 429. It was also held that the Berlin decree was illegal, and that the underwriters were liable for a loss occasioned by a violation of it. But see *Speyer v. New York Ins. Co.*, 3 Johns. 88. The decree was not known when the vessel sailed, and was considered therefore not to apply. And the condemnation being made by Napoleon in person, and not by any court of competent jurisdiction, it was held to be an act of violence not falling within the true intent of the warranty. This case was decided in 1817, but in 1811, in an action on a policy on the same voyage, *Washington, J.*, held that it made no difference that the insured did not know of the decree, and decided the case in favor of the defendants, on the ground that there was a breach of the warranty of neutrality owing to the absence of the documents which were required by the decree, of which the insured had no knowledge. The other points were not touched upon. *Smith v. Delaware Ins. Co.*, 3 Wash. C. C. 127. It was held also in *Faudel v. Phoenix Ins. Co.*, 4 S. & R. 29, that a seizure for a violation of the Berlin decree was not a seizure within the exception, it being against the law of nations. See also *Cucullu v. Orleans Ins. Co.*, 18 Mart. La. 11; *Gracie v. New York Ins. Co.*, 13 Johns. 161. "To constitute a breach of such warranty," said *Sutherland, J.*, in *Francis v. Ocean Ins. Co.*, 6 Cow. 404, 427, "the seizure must be for an actual, illicit, and prohibited trade. A seizure and condemnation under pretext

of such trade is not sufficient, if the trade is not in fact illicit. Both a seizure and illicit trade must concur; and the illicit character of the trade is not proved merely by the fact of the seizure. See also *Johnston v. Ludlow*, 2 Johns. Ca. 481, 1 Caines, Ca. xxix; *Savage v. Pleasants*, 5 Binn. 403.

<sup>1</sup> In *Powell v. Hyde*, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44, a vessel and her cargo were insured from Galatz to London. The policy was in the usual form, but contained a stipulation that the ship and goods were warranted "free from capture and seizure, and the consequences of any attempt thereof." The vessel passed the mouth of the Ismail River where there was a Russian fort, and close enough to the shore to be hailed, with the English ensign flying, without being molested or receiving any communication from the shore. After the vessel had passed the fort about half a mile, two guns were pointed at her, and fired till the vessel sunk. After the firing commenced, the anchor was dropped and the sails lowered. The officers and crew escaped in their boats, and landed on the Russian side of the river, where they were detained as prisoners several weeks. War, at this time, had not been declared between England and Russia. Held, that the exception covered illegal as well as legal seizures, and that there was a seizure in point of law. Lord *Campbell, C. J.*, said: "I am clearly of opinion, upon the evidence laid before us, that when the Russian guns fired, and the ship dropped her anchor, and the crew forsook her, and she was at the mercy of the Russians, she was seized by the Russians, just as much as if the Russians had act-

while she is in her port of discharge. And the question has arisen, what is to be considered as such port? <sup>1</sup>

Excepted risks are sometimes, by the circumstances of the case,

usually come on board and taken manual possession of her, and afterwards sent her to the bottom. If they had done that, it would have been a seizure; although, after she is seized, they choose, instead of taking her into port, to send her to the bottom of the Danube, still it is a seizure."

In *Black v. Mar. Ins. Co.*, 11 Johns. 287, insurance was effected against capture only, warranted free from seizure in any river, port, or place, under the jurisdiction of Napoleon, or under the jurisdiction of any power under his control or in alliance with him. The vessel was taken on the coast of Holland, by two French privateers, and carried into Amsterdam, and afterwards condemned as prize of war. It was held, that, though the word "seizure" was generally applicable to a taking or detention for the violation of some municipal regulation, yet here it was to be taken as meaning the same as capture, because to give the exception any effect it must be construed to limit the risk assumed by the general words of the policy, and here the insurance was against capture only, and the underwriters were therefore held not to be liable, Holland being in alliance with, or under the control or jurisdiction of Napoleon.

<sup>1</sup> In *Dagleish v. Brooke*, 15 East, 295, and in *Maydhew v. Scott*, 3 Campb. 205, it was held that a vessel in the roads of Pillau, two miles from the inner harbor, was to be considered as in the port of discharge. In each of these cases the vessel was seized by a land force. But in *Brown v. Tierney*, 1 Taunt. 517, the vessel while in the same

roads was taken by a French privateer, and the underwriters were held liable. In *Oom v. Taylor*, 3 Campb. 204, a vessel bound for Rugenwald anchored about two miles and a half from the harbor of that place, and made a signal for a pilot. A pilot-boat came in consequence, but with *douaniers* on board, who carried the ship into the harbor, where the cargo was seized and condemned. Held, that this was a seizure within the port of discharge. And in *Jarman v. Coape*, 2 Campb. 613, 13 East, 394, where a vessel bound for the port of Varrel was seized in the river Jahde, fifteen miles from that place, the underwriters were discharged. The case, however, turned in a great measure on the fact that there was evidence that the parties contemplated landing the goods somewhere along the banks of the river, rather than at Varrel. In *Mellish v. Staniforth*, 3 Taunt. 499, the vessel was captured while at anchor four miles from the roads of her port of discharge. The underwriters were held liable. So where a vessel was captured after coming to anchor outside of the roads of Pillau. *Levy v. Vaughan*, 4 Taunt. 387; *Keyser v. Scott*, 4 Taunt. 660. And in *Baring v. Vaux*, 2 Campb. 541, where a vessel was captured by a privateer while lying within the headlands of the river, half a mile from her port of destination, the jury having found that she was not in port at the time, a verdict was found for the plaintiff. The criterion adopted in many of these cases seems to be whether the ship was in the place where vessels usually unloaded their cargoes.

mingled with those insured against, so that it is not quite easy to say to which class the loss is owing; as where a ship warranted free from capture was first stranded on the coast of Spain, and then seized and made prize of. The general rule must be, that the insurers are liable or exonerated, according as the leading and principal cause of the loss be one insured against or one that is excepted.<sup>1</sup> And in such a case the burden of proof is on the

<sup>1</sup> *Hahn v. Corbett* 2 Bing. 205. The insurance in this case was on goods warranted free from capture. The vessel was lost by striking on a sand bar nine miles from the coast. Part of the goods were saved by the enemy in a damaged condition. The court considered the loss as total when the ship struck, and held therefore that the right of the owner to recover could not be changed by subsequent events. *Park, J.*, said: "Supposing the goods had been sunk, the assured would have been entitled to recover for a total loss; and if they had afterwards been fished up by the enemy, would that have made any difference? Assuredly not." See also *Bondrett v. Hentigg*, Holt, N. P. 149. In *Livie v. Janson*, 12 East, 648, it was held that where there was a partial loss by sea damage, and a subsequent total loss by an excepted peril, there could be no recovery for the sea damage. And this decision was sustained by *Kent, C. J.*, in *Schieffelin v. New York Ins. Co.*, 9 Johns. 21, where, the ship being lost, the master was prevented from carrying on the goods, which he might otherwise have done, by a seizure by government. It was held that the defendants were not liable. See on this question of a partial loss being merged in a total loss, *Knight v. Faith*, 15 Q. B. 649. In *Rice v. Homer*, 12 Mass. 230, the vessel was damaged while on her voyage, by sea perils to the extent of three fourths of her value, and part of the car-

go, which was also insured, was thrown overboard. In consequence of this misfortune, the vessel was forced to put into port, where she was seized by the government and condemned. It was held that the vessel was lost by the seizure, for which, it being an excepted peril, the underwriters were not liable. But the assured were allowed to recover for the cargo which had been jettisoned, on the ground that it would have been lost whether the ship had been captured or not. In *Green v. Elmslie*, Peake, N. P. 212, the vessel was insured against capture only, and was driven out of her course on to the coast of France, and then captured. It was held that the underwriters were liable. In *Levi v. Allnutt*, 15 East, 267, goods insured were warranted free from *confiscation* by the government in the ship's port or ports of discharge. While in the roads of Pillau, the vessel was seized by some Prussian soldiers from Pillau, and by some Frenchmen from a privateer. These disputed about the possession, and the matter was referred by the Prussian government to the French government at Paris. The ship was condemned as prize to the French captors. It was held not to be a *confiscation* by the Prussian government. Lord *Ellenborough* said: "It only showed a permission by the Prussian government that France should do as it pleased in the Prussian ports; and to hold this to be a Prussian confiscation would be say-



insured to show definitely the amount of his loss by the peril insured against.<sup>1</sup> Thus, where goods are insured against fire, and loss by theft is excepted, the insurers are not liable for a loss by theft, which took place after the goods had been removed to save them from the fire.<sup>2</sup> This question is similar to that where a loss is owing to a cause which is in some way connected with and resulting from a peril insured against; or where a peril insured against makes a *causa causans* (not itself insured against) efficacious in the production of the mischief; or the converse. To determine the difficult and important questions which arise in regard to this subject, recourse is had to the rule of *causa proxima non remota spectatur*. Some of the difficulties at-

ing that every country on the continent too weak at this period to protect its independence against France confiscated all the property which the French chose to take within its territories."

In *Duval v. Comm. Ins. Co.*, 10 Johns. 278, no risk was taken in port but a sea risk. The vessel was captured at sea and taken into port, and there taken possession of by the French government. Held, that the underwriters were liable. *Per Curiam*: "If the taking possession of the vessel in this manner is to be deemed a capture, and of which there can be no doubt, the subsequent proceedings against her or the cargo are totally immaterial, if she was never released from the capture. Admitting that the proceedings after her being carried into Port Passage are to be deemed a seizure in port, it will not discharge the underwriters. The capture was so far a total loss as to justify an abandonment; and unless released or restored before such abandonment, the rights of the parties were fixed, and it is immaterial what further perils awaited the property." The case of *Barney v. Maryland Ins. Co.*, 5 Harris & J. 139, is not in conflict with this decision, as is stated by Mr. Phillips. The

policy contained an exception of seizure in port. The vessel was captured and carried into port, and by order of the minister of the marine, without any legal condemnation, was converted into a public armed ship. The policy contained a clause whereby the insured stipulated not to abandon in case of capture till condemned. Held, that the insured could not abandon for the capture, there having been no condemnation, and that the act of the minister was a seizure in port. Where no risk in port but sea risk was taken, and the vessel while in port was stranded and forty-eight hours afterwards destroyed by a hostile force, the jury having found that the vessel was totally lost by the stranding, the court refused to set aside a verdict for the plaintiffs, and also held that the term "port" was not confined to the port of departure, or to the port of discharge, but was used in a general sense as contradistinguished from the high seas. *Patrick v. Comm. Ins. Co.*, 11 Johns. 9.

<sup>1</sup> *Heebner v. Eagle Ins. Co.*, 10 Gray, 143.

<sup>2</sup> *Webb v. Protection Ins. Co.*, 14 Mo. 3.

tending the application of this rule we have already considered, in determining which is the proximate and which the remote cause of the loss, when a loss takes place by a peril insured against, and this peril could have been safely encountered but for the negligence of the servants of the assured. And we shall here content ourselves with mentioning some of the authorities which illustrate, if they do not determine, the proper mode of applying this maxim.

Thus, if goods are damaged by the dampness arising from water in the hold of a vessel, the dampness is considered as the proximate cause in Massachusetts, and the underwriters are not liable;<sup>1</sup> while in England, where the goods were damaged by the vapor arising from hides which had been injured by sea-water entering the hold, it was said to be a mere playing with terms not to call the water the proximate cause.<sup>2</sup> And where a vessel went ashore in consequence of two men, who had been sent on shore to cast off a rope, being seized by the press gang, the underwriters were held liable.<sup>3</sup> If a ship is disabled by a peril of the sea, and while at an intermediate port the master, to defray the expense of repairs, is obliged to sell part of the cargo and apply the proceeds to this purpose, the underwriter on the cargo is not liable, the peril being but the remote cause of the loss.<sup>4</sup> In the same manner the insurer has nothing to do with the results consequent upon the protraction of the voyage.<sup>5</sup> But he is liable

<sup>1</sup> *Baker v. Manufacturers' Ins. Co.*, Sup. Jud. Ct., Mass., March Term, 1851, 14 Law Reporter, 203.

<sup>2</sup> *Montoya v. London Ass. Co.*, 6 Exch. 451, 4 Eng. L. & Eq. 500.

<sup>3</sup> *Hodgson v. Malcolm*, 5 B. & P. 336.

<sup>4</sup> *Powell v. Gudgeon*, 5 M. & S. 431; *Sarqay v. Hobson*, 2 B. & C. 7, affirmed in the Exchequer Chamber, 1 Young & J. 347, 4 Bing. 131; *Moses v. Sun Mutual Ins. Co.*, 1 Duer, 159; *Ruckman v. Merchants' Ins. Co.*, 5 Duer, 371.

<sup>5</sup> In *Tatham v. Hodgson*, 6 T. R. 656, where a number of slaves died in consequence of an insufficient supply of water caused by the voyage being pro-

tracted by bad weather, it was held that the underwriters on the slaves were not liable. In *Jones v. Schmoll*, Park, Ins. 77, 1 T. R. 130, note, the underwriters were liable for "mortality by mutiny." A mutiny took place and some of the slaves were killed, others wounded, and others starved themselves to death, and the value of the survivors was lessened on account of the mutiny having taken place. It was held, that the underwriter was liable for those who were killed during the mutiny, and for those who died in consequence of their wounds but not for the loss of the market. "The jury found, that all who were killed in the mutiny, or died of

for all the consequences directly resulting from a peril insured against; as where a boat is lost, after a storm has ceased, in consequence of damage done during the storm.<sup>1</sup>

Exceptions are often made—as they always may be at the pleasure of the parties—to suit the peculiar circumstances of the case; and no other rule can be given than that such exceptions must always be construed according to the actual intention of both parties, so as to carry it into effect, rather than defeat it. Thus, where animals were insured “free from mortality,” and many were killed by the rolling of the ship in a tempest, the court held that the mortality excepted must be construed in its usual sense, and that this did not include the idea of a violent death.<sup>2</sup>

their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for. That all who had swallowed salt water, and died in consequence thereof, or who leaped into the sea and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin, were not to be paid for.”

<sup>1</sup> *Potter v. Ocean Ins. Co.*, 3 Sumner, 27. In *Naylor v. Palmer*, 8 Exch. 739, 22 Eng. L. & Eq. 573, *Palmer v. Naylor*, 10 Exch. 382, 26 Eng. L. & Eq. 455, a cargo of coolies, on whom insurance was effected, seized the vessel, killed the captain and part of the crew, and took the vessel into port and then ran away, leaving the vessel in the possession of the mate and the rest of the crew. It was contended that the unwillingness of the coolies to be carried on was the proximate cause of the loss. But the court held, that, to determine what was the proximate cause, reference must be had to the time when the loss took place, and this was considered to be when the vessel was first seized. In *McCargo v. New Orleans Ins. Co.*, 10

*Rob. La.* 202, slaves were insured from Norfolk to New Orleans, against all risks, and chiefly against that of foreign interference, but there was a warranty on the part of the assured against loss by elopement, insurrection, and natural death. While the vessel was on her voyage, slaves, other than those of the plaintiff, arose and seized the vessel and carried her into a British port, where the slaves were liberated by the British government; the crew did not regain possession of the vessel till after this took place. It was held that the insurrection was to be considered the cause of the loss, and not the interference of the government; and the court said that the last cause of the loss was not always, nor necessarily, the proximate cause.

<sup>2</sup> *Lawrence v. Aberdeen*, 5 B. & Ald. 107. So, where horses, in consequence of the laboring of the vessel, broke down the partitions by which they were separated, and, by their kicking, bruised and wounded each other so much that they died, it was held, that this was a loss by a peril of the sea. *Gabay v. Lloyd*, 3 B. & C. 793.

“Free from loss, if not permitted to

If, in a policy insuring a steamer, there is a clause exempting the insurers from liability for the breaking of the machinery of

*entry*, in consequence of having negroes on board," means that the underwriters are not liable if the vessel is refused entry at the custom-house, and does not mean that the vessel should be exempt from a compliance with the customary port regulations as to the mode and place of discharging her cargo. *Dickey v. United Ins. Co.*, 11 Johns. 358. In *Law v. Goddard*, 12 Mass. 112, the underwriters were exempted from all loss or expense that might arise from the ordinary dangers and perils of the seas. Held, that the only risks intended to be covered were capture, arrest, detention, &c.

In *Coolidge v. N. Y. Firem. Ins. Co.*, 14 Johns. 308, the policy contained the following memorandum: "Warranted free from loss by the British or Americans; but in case of capture or detention by either of the above-named powers, the usual sea risks to continue." The vessel was captured by a British brig and carried into Gibraltar. While there, the vessel was moored in a dangerous and exposed situation, in consequence of which several vessels ran into her, and injured her very much. Held, that, as the underwriters would have been exonerated had no capture intervened, they were not liable for the negligent act of the captors, which was the proximate cause of the loss. At the present time, probably, the collision would be considered as the proximate cause. Being prevented from leaving port by a blockading squadron, is a detention within the exception "warranted free from British and American capture and detention." *Wilson v. United Ins. Co.*, 14 Johns. 227.

The exception, "French risks," means

loss by the acts of Frenchmen. *Roget v. Thurston*, 2 Johns. Ca. 248.

In *Palmer v. Warren Ins. Co.*, 1 Story, 360, the following clause in a time policy for one year was the subject of considerable discussion and difficulty: "Excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." The vessel sailed for Cuba and arrived there about the 1st of October, sailed from there on the 25th for New York, and was wrecked in Long Island Sound on the 15th of December following. It was held, that this was not a warranty that the vessel should not be employed in any voyages to or from the ports mentioned within the times specified, nor was it to be construed as allowing such voyages during the period but exonerating the underwriters from all liabilities for losses in the course thereof; but it meant merely that all risks and losses in the ports and places specified and within the time mentioned were excluded. The underwriters were therefore held liable.

In Louisiana, it is provided by law, that the underwriters shall not be liable for a loss by accidents in racing, collision with another boat, etc., "except such as is impossible to be foreseen and avoided." This has been held to have reference to an impossibility by reasonable intendment according to the circumstances of each particular case. *Caldwell v. St. Louis Perpet. Ins. Co.*, 1 La. Ann. 85. In *Citizens' Ins. Co. of Mo. v. Glasgow*, 9 Mo. 406, there was a provision that the underwriters should not be liable for the bursting of boilers or breaking of engines, unless occa-

the vessel, "unless occasioned by stranding," if the vessel is injured first by a sea peril, and then by stranding, the burden is on the insured to prove the amount of the peril done by the stranding.<sup>1</sup>

In a case in Ohio, the policy provided that the insurers should not be liable for the expense of dockage, or hauling out for repairs, or for any loss (except in case of general average), unless the necessary repairs caused solely by the disaster amounted to ten per cent on the agreed value in the policy. The vessel met with a disaster, and was repaired in a dry dock, and the dockage expenses added to the cost of repairs amounted to more than ten per cent. It was agreed that the amount charged for the use of the dock was a fair charge in amount, and that injuries such as were occasioned by the disaster in this case were invariably repaired by the use of a dry dock. It was held that the plaintiff was entitled to recover, mainly on the ground that the words "any loss" included all expenses rendered necessary from casualties insured against, and that the particular instances of loss mentioned could not comprehend more than the general term which followed them, and that if the general term were alone looked to, it was clear that the underwriters were liable. It would certainly have been more in conformity to the principles of construction, if not more accurate, to say that general words, following particular ones, are to be construed as applicable to subjects *ejusdem generis*, and not that the particular words are to be struck out. The decision may, however, be correct on

sioned by external violence. One boiler burst and threw overboard the other two. Held, that external violence meant violence external to the boat, and not to the engine or other boilers merely, and that the underwriters were therefore not liable. In a late case in Pennsylvania, *Western Ins. Co. v. Cropper*, Jan., 1859, 7 Am. Law Register, 237, the policy contained the following clause: "It is understood that this company is not liable for any breakage or derangement of the engine, or bursting of the boiler, or any of the parts thereof, or for the effects of fire from any cause connected with the operation of,

or the repairs of, the engine and boiler, unless the damage be occasioned and the repairs rendered necessary by the stranding or sinking of the vessel, after her engines and boilers shall have been put in successful operation." It was held, that the underwriters were liable for a total loss, although that loss could be traced back to the breakage of the machinery as its first cause, the court being of the opinion, that the clause did not except damage caused by the breakage of the machinery.

<sup>1</sup> *Heebner v. Eagle Ins. Co.*, 10 Gray, 131.

the ground that the limitation, "unless the necessary repairs," &c., applies equally to the clause, "expense of dockage or hauling out for repairs," as well as to the phrase "or for any loss."<sup>1</sup>

Important questions as to risks excepted arise in respect to bottomry and *respondentia* interests. The full consideration of the nature of these interests belongs rather to the Law of Shipping. It may here be said, that it is of the essence of these contracts, that the lender of money on bottomry and *respondentia* takes upon himself the risk of the safe arrival of the ship, or of the goods, on which he has his lien.

He therefore can, and often does, insure himself. This is in the nature of reinsurance, and by it the lender often makes his debt certain and keeps his excessive interest or much of it. As, if he lends a sum at fifteen per cent marine interest, when legal interest is six per cent, if he insures himself for three per cent, he may get his money and twelve per cent if the property be lost. Some question has been made, as to the extent and nature of his insurable interest; but we are not able to see any good reason why his insurable interest is not commensurate with the value of the property, in like manner as the interest of a mortgagee.<sup>2</sup>

It may be added, in this connection, although the subjects have been already considered, that no policy will enure to the benefit of a party who cannot be legally insured, as an alien enemy, for example, or will attach to a subject-matter in interest which cannot be legally possessed by the insured, or to a trade

<sup>1</sup> Snapp v. Merchants' & Man. Ins. Co., 6 Ohio, 458.

<sup>2</sup> Simonds v. Hodgson, 3 B. & Ad. 50. In Goddard v. Garrett, 2 Vern. 269, decided in 1692, money was lent on bottomry, and the lender effected an insurance on the ship to protect his claim. As he had no other interest in the ship, the court ordered the policy to be delivered up and cancelled. The insurance was declared to be on bottomry, and the decision cannot be supported. See Harman v. Vanhatton, 2 Vern. 717. But the lender on bottomry or *respondentia* must specify his interest, and a

general insurance on the ship or cargo is not enough. Glover v. Black, 3 Burr. 1394, 1 W. Bl. 422; Robertson v. United Ins. Co., 2 Johns. Ca. 250; Jennings v. Ins. Co. of Penn., 4 Binn. 244, 251. The owner, however, of a ship, on which a bottomry bond has been given, may insure his interest generally. Kenny v. Clarkson, 1 Johns. 385. So, where a party purchased a vessel, not knowing that a bond had been given upon her, it was held, that he had an insurable interest. Williams v. Smith, 2 Caines, 13.



which is prohibited by the laws of the country where the insurance is made, or against perils or risks which positive law or the certain policy of the law excludes from the benefit of indemnity by insurance.

## SECTION XII. — *Of the Memorandum.*

### A. *Of the Articles enumerated in the Memorandum.*

THE policies in general use in this country except from all loss that is not total, or a subject for contribution, certain articles, and from all loss by damage that is less than certain proportions other enumerated articles of cargo (all of these articles being especially liable to damage), and sometimes the ship and freight. These exceptions were originally introduced in English policies in a note or memorandum; and still are so, in those policies generally; but in this country they are usually inserted in the body of the policy, although we still use the phrases, “memorandum risks,” “memorandum articles,” and “memorandum rates.”

The terms used to express this limitation of liability on the part of the insurers are various. Sometimes the words “against total loss only,” “not liable for partial loss,” “partial loss excepted,” are used, but those most frequently employed are “free from particular average,” and “free from average unless general.” Sometimes, however, the phrase is “free from average,” and then the insured cannot recover, unless there is a total loss, the words being held to exclude a general-average loss, as well as a partial loss.<sup>1</sup>

Many of the articles enumerated in the memorandum are called by ambiguous names. Thus, “corn”<sup>2</sup> means one thing in

<sup>1</sup> *Coster v. Phoenix Ins. Co.*, 2 Wash. C. C. 51; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. 385.

<sup>2</sup> In England, it has been held that malt, which is corn in a manufactured state, is included in the term “corn,” in the memorandum. *Moody v. Surridge*, 2 Esp. 633. So are peas. *Mason v. Skurray*, Marsh. Ins. 226, Park, Ins. 160.

Rice, however, has been held not to come within the meaning of this term. *Scott v. Bourdillion*, 5 B. & P. 213.

The above case of *Mason v. Skurray* is cited in *Hughes on Ins.* 142, 2 Arnould, Ins. 853, 2 Phillips, Ins. § 1764, and in *Maude & Pollock on Shipping*, 235, as deciding that peas and beans are included within the term “corn.” Mr.

England, and another in this country ; and it is not certain how much this word embraces, there or here. So "furs," "skins," and "hides"<sup>1</sup> are discriminated by a line that is certainly obscure, if not arbitrary. And "salt,"<sup>2</sup> "roots,"<sup>3</sup> and "fruit"<sup>4</sup> have given rise to similar questions. So "ice" has been held to be perishable in its nature.<sup>5</sup> We state in our notes all the decisions

Marshall, on p. 223, note, makes mention of this case as follows: "The term 'corn,' comprehends every sort of grain, and also peas and beans. *Vide* Mason v. Skurray, *infra*." On page 226, it is said that the insurance was on a cargo of peas. Mr. Park, on pages 149 and 160, cites the case in the same way as Mr. Marshall, on one page, as an authority that the word "corn" includes peas and beans, and, on the other, that the insurance was on peas. This case was decided in 1779, and Mr. Weskett, who wrote in 1783, says: "An action was brought against the defendant, to recover a loss on peas damaged very much by sea-water; and determined at Guildhall, Mich. 1799, that peas are to be considered as corn, or grain." Weskett on Ins. 389. Millar, also, who wrote in 1787, mentions peas only. Millar, Ins. 358. The question is, however, one of not much importance, except in determining the precise point decided by the case alluded to; for peas and beans would doubtless be governed by the same rule, and Mr. Weskett, on page 146, mentions the following articles as being enumerated in several English statutes relating to corn, namely: "wheat, rye, barley, oats, peas, beans, malt, pearl barley, or other corn, ground or unground, bread, biscuit, meal, and grain." In this country, the word "corn" is generally used in a more limited sense, and its meaning would depend very much upon usage.

<sup>1</sup> In *Bakewell v. United Ins. Co.*, 2 Johns. Ca. 246, the word "skins" was

held to include deer-skins. In *Astor v. Union Ins. Co.*, 7 Cow. 202, the policy contained the clause, "free from average on skins, hides, and other articles, perishable in their nature." At the time the insurance was effected, the invoice of the goods was presented, headed "invoice of furs," and describing the articles as skins of the bear, raccoon, opossum, deer, fine-fisher, cross-fox, martin, white raccoon, wild-cat, wolf, wolverine, panther, and cub. There was much evidence gone into, to prove that the term "skins" was applied when the skin was the chief value, and that "furs" was used when the fur gave the article its value, and that furs were not perishable articles. A verdict being given for the plaintiff, the court refused to set it aside.

<sup>2</sup> Saltpetre has been held not to be included in the term "salt." *Journu v. Bourdien*, Marsh. Ins. 224, note, Park, Ins. 149.

<sup>3</sup> *Coit v. Commercial Ins. Co.*, 7 Johns. 385, where, a usage being shown that sarsaparilla is not considered a perishable article, it was held not to come within the term "roots." This word was considered by the experts to mean beets, onions, etc.

<sup>4</sup> In *De Pau v. Jones*, 1 Brev. 437, dried prunes were held to be "fruit." The voyage was from Bordeaux to Charleston. Oranges also come within this term. *Humphreys v. Union Ins. Co.*, 3 Mason, 429.

<sup>5</sup> *Tudor v. New England Ins. Co.*, 3 Cush. 554.

which bear upon this subject. If one species of an article is mentioned, this may exclude another.<sup>1</sup> In regard to what articles are considered as perishable in their own nature, it would depend very much on the usage of the trade.<sup>2</sup>

*B. Of the Clause respecting Stranding.*

As the memorandum articles are all of them of a perishable nature, and especially liable to a partial deterioration, insurers desired, many years since, to protect themselves from liability for injury to them, unless it was certain that this was not caused by inherent defect or decay. For this purpose, it was provided that the memorandum articles should be "free from average, unless general, or the ship be stranded."<sup>3</sup>

The original intention of this provision cannot be doubted. It was, that the insurers should not be held for any partial loss on these perishable articles, unless this was caused by a peril of such a nature as to exclude all probability that the loss was due to the nature of the goods. Such a loss it was intended to designate by the word "stranding"; and we may suppose the word to have been equivalent, in the minds of those who first used it, to "wreck."

It seems certain that the insurers intended to say, that they should not be liable for a partial loss on these goods, unless the

<sup>1</sup> *Baker v. Ludlow*, 2 Johns. Ca. 289, where the mention of "dry fish" was held to exclude "pickled fish."

<sup>2</sup> In *Nelson v. La. Ins. Co.*, 17 Mart. La. 289, parol evidence was admitted to show whether flour was an article perishable in its nature. In *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220, and *Williams v. Cole*, 16 Maine, 207, potatoes were held to be perishable articles. In *Baker v. Ludlow*, 2 Johns. Ca. 289, the court said: "The subsequent words, 'all other articles perishable,' etc., are not applicable to the articles previously enumerated, nor can they repel the implication arising from the enumeration of them."

<sup>3</sup> The memorandum clause was inserted in English policies in 1749, but the clause relative to stranding was struck out a few years afterwards, in the policies of the London Assurance and the Royal Exchange Assurance Companies. See *Stevens & Benecké on Average* (Phillips's ed.), 395. The London Assurance Company have since reinserted it, and the Royal Exchange Assurance Company have modified the clause, so that it reads, "free from all average, etc., unless general, or otherwise specially agreed." 2 Arnould, Ins. 852.

ship was stranded or wrecked, and the goods thereby injured. The courts did not, however, incline to this view, but adopted the more literal construction and interpretation of the phrase, and a meaning was given it which was far from that originally intended.

Thus, it seems now to be settled, that the phrase is to be read as if it ran thus: "goods to be free, etc., *unless* the ship be stranded." And then this stranding is to be regarded as a condition, and, if it takes place, the whole effect of the provision is exhausted, and the insurers are liable, *if there once be a stranding*, for any partial loss, in the same manner as if this provision had no existence. The reason given for this is, that, in case of stranding and partial loss, it would be impossible, or very difficult at least, to say how much of the injury to the goods arose from their own perishableness, and how much from the previous stranding. This construction is now well settled; but we do not think that it rests on good grounds.<sup>1</sup>

<sup>1</sup> The first case after the clause was introduced was in 1754, before Lord Chief Justice *Ryder*, *Cantillon v. London Ass. Co.*, cited 3 Burr. 1553, where it is said the court "and a special jury looked upon this as a condition, and that by the ship's being stranded the insurer was let in to claim his whole partial-average loss." In 1764, the question arose whether the exception, "free from average, unless general," let in a partial loss, where there was also a general average. Lord *Mansfield* said: "The insurer is liable for all losses arising from the ship being stranded, and in all cases where there is a general average; but all other partial losses are excluded by the express terms of the policy." *Wilson v. Smith*, 3 Burr. 1550.

The same reason would seem to apply here as in the case of stranding, and the fact that the insured was permitted to recover only the damage sustained by the general average, which ruling has not been controverted to this day, shows, we think conclusively, that the

intention was to exclude all partial loss, except that sustained in consequence of a general average, and by stranding.

In 1790, came the *nisi prius* case of *Bowring v. Elmslie*, 7 T. R. 216, n., before Lord *Kenyon*, C. J. The insurance was on fish. Lord *Kenyon* charged that "the stranding of the ship put the fish in the same condition as any other commodity not mentioned in the memorandum, and the underwriters were liable for all damage sustained by it; for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum was intended to prevent." The defence in this case was twofold: 1st, that the ship had been fraudulently stranded; 2d, that the damage to the fish was not occasioned by the stranding. The jury found for the defendant, on the ground that the stranding was fraudulent.

So, it is settled, that if there be a stranding, the insurers are liable, although the partial loss took place at a different time, from a different cause, and at a different place. Such, at least, is the law in England;<sup>1</sup> but some question exists, whether in this country a construction would not be given to this clause, upon this point, more in harmony with the intention of those who originally used it. Here, however, the question is not of so much importance, because our policies either provide that the loss shall happen by the stranding, or the clause in regard to stranding is struck out altogether. And in England, if the stranding take place after the memorandum articles have ceased to be at risk, and the adventure as to them has terminated, it is not a "stranding," within the policy.<sup>2</sup>

The phrase, "or the ship be stranded," is construed so far strictly that no stranding, unless of the ship itself, — none there-

The next case in point of time is *Nesbitt v. Lushington*, 4 T. R. 783, decided in 1792, where a mob came on board the vessel, and weighed anchor, upon which the vessel drove upon a reef of rocks and was stranded. The mob compelled the captain to sell all the cargo at a price less than its value, except about ten tons, which was damaged by the stranding, and was thrown overboard. It was held, that the insured could only recover for that portion which was injured by the stranding. In *Burnett v. Kensington*, 1 Esp. 416, 7 T. R. 210, the vessel struck on a rock, but did not remain there, although several of her planks were started and water entered and damaged the cargo. She was afterwards voluntarily stranded by the captain, under the directions of a pilot, in order to save both ship and cargo. The ship sustained no damage from the stranding, and afterwards pursued her voyage with the greater part of the cargo. After several trials, the jury found that the ship was stranded, but that the damage did not arise in

any way from it, and a verdict was found for the defendant. But the court held, that, if the ship was stranded, this destroyed the exception and let in the general words of the policy. Lord Kenyon, speaking of *Bowring v. Elmslie*, and *Nesbitt v. Lushington*, said: "My two opinions that have been referred to, the one in the *nisi prius* case, and the other in *Nesbitt v. Lushington*, have no weight with me as judicial authorities, though I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases."

<sup>1</sup> See 2 Arnould, Ins. 858.

<sup>2</sup> *Roux v. Salvador*, 1 Bing. N. C. 526. In this case, the goods were sold at an intermediate port, and the ship was afterwards stranded before reaching her port of destination. Held, that, if there was not a total loss at the intermediate port, the subsequent stranding would not let in a claim for a partial loss. The decision was afterwards reversed, but this position was not controverted. 3 Bing. N. C. 266.

fore of a lighter in which the goods were passing to the shore, — is a “stranding” within the policy.<sup>1</sup>

But the cases have turned principally upon the meaning to be given to this word “stranding.” Literally, its meaning is obvious enough. A vessel is stranded when she gets upon the strand, or shore. And as this occurs generally only when a vessel is wrecked, the word was originally used, as we have already intimated, in this sense.

It is not so now. Both in England and in this country, it seems to be settled, that if the ship be literally stranded, that is enough, without much reference to the length of time that she remains on shore, or any regard to the effect of this stoppage. It is true, that the courts say it is not enough that the ship did just “touch and go”; her course must be arrested, and all progressive motion must cease.<sup>2</sup> And in one case, where a vessel struck on a rock which made a hole in her bottom whereby the cargo was damaged, it was held not to be a stranding, because the course of the vessel was not delayed.<sup>3</sup> But if, after a few minutes of delay upon the rock or strand, she is thrown off by wind or tide, or dragged off by human aid, still she was “stranded” within the legal meaning of the policy; and this, although neither ship nor cargo was at all injured.<sup>4</sup>

So she is “stranded” if she falls and rests on piles, or any

<sup>1</sup> Hoffman v. Marshall, 2 Bing. N. C. 383.

<sup>2</sup> Thus in Harman v. Vaux, 3 Campb. 429, Lord Ellenborough, C. J., said: “If the ship touches and runs, the circumstance is not to be regarded. Here she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she thereby sustains.” And in M'Dougle v. Royal Exch. Ass. Co., 4 M. & S. 503, where the vessel rested but a minute and a half on the rock, it was held to be no stranding. Lord Ellenborough, C. J., said: “But I take it that stranding, in its fair legal sense, implies a settling of

the ship; some resting, or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked.” In the same case at *nisi prius*, 4 Campb. 283, he said: “*Ex vi termini* stranding means lying on the shore, or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if there is ‘touch and go’ with the ship, there is no stranding.”

<sup>3</sup> Lake v. Columbus Ins. Co., 13 Ohio, 48.

<sup>4</sup> A delay of fifteen or twenty minutes on a rock has been held to be a stranding. Baker v. Towry, 1 Stark. 436. So a delay of two hours on a bank. Herman v. Vaux, 3 Campb. 429.



artificial fabric, as much as if she lay on a rock, or a bank, or the shore.<sup>1</sup> In one case it was held not to be a stranding where the vessel came into collision with another, and was forced ashore, where she remained an hour.<sup>2</sup>

It is not a "stranding" if she takes the ground in a tide harbor, in any usual way and place, merely by the effect of the tides.<sup>3</sup> But if extraordinary circumstances or agencies mingle with these natural and customary events, and give to them their destructive or injurious efficacy, so that the vessel comes to the ground in an unusual and perilous way, this is held to be a "stranding."<sup>4</sup>

<sup>1</sup> *Dobson v. Bolton*, Marsh. Ins. 239, Park, Ins. 148, n. The vessel in this case rested on the piles till they were cut away.

<sup>2</sup> *Baring v. Henkle*, Marsh. Ins. 240. It was contended, in this case, that it could only be a stranding where the ship was either cast on shore by the violence of the winds and waves, or run aground to avoid a greater danger; and this doctrine seems to have been assented to by Lord *Kenyon*, C. J.

<sup>3</sup> In *Kingsford v. Marshall*, 8 Bing. 458, 1 Moore & S. 657, the vessel entered a tide harbor, was moored as directed, and took the ground at low tide. This was held not to be a stranding, although in taking ground she struck against some hard substance, by which two holes were made in her bottom and her cargo was injured. In *Hearne v. Edmunds*, 1 Brod. & B. 388, the vessel was three days in going up Cork River. She took the ground every day, and on the third day was moored at the quay. When the tide ebbed, she took ground, made a list, and lay on her broadside two tides, in consequence of which the vessel and cargo were much injured. This was held not be a stranding, being in the usual course of navigation. See the preceding note.

<sup>4</sup> The question how far the taking

ground is extraordinary in its nature is a difficult one, and has given rise to cases of great nicety in its application. Thus, where a vessel was fastened by a rope to a pier, in order that she might take the ground in an upright position, and the rope broke, in consequence of which she fell on her side and was bilged, it was held to be a stranding. *Bishop v. Pentland*, 7 B. & C. 219, 1 Man. & R. 49. See also *Carruthers v. Sydebotham*, 4 M. & S. 77. So in *Wells v. Hopwood*, 3 B. & Ad. 20, where the ship, at the time the tide was about to fall, was hauled off from the wharf and fastened by a rope from an adjoining wharf, so that she could avoid a heap of rubbish which lay near her own wharf, and take the ground in safety, but there being a strong wind the rope stretched, and, when the tide fell, one end of the vessel came upon the heap, in consequence of which her seams opened and the cargo was damaged, though when the tide rose the seams closed and no damage to the ship was apparent, it was held to be a stranding. In another case, the vessel was going through a canal, and it became necessary, in order to repair a lock, that the water should be drawn off. The vessel was moored in what was thought to be a secure place, and one where ves-

And it has been held, that, if the vessel be stranded voluntarily and of set purpose, this may be a stranding within the policy.<sup>1</sup> And we see no good reason why this should not be considered as a stranding to all intents and purposes, provided only that it be done in good faith, and in the exercise of a reasonable discretion.

In some policies, both in England and in this country, there seems to be some disposition to return to the original meaning of the provision, by using the word "bilging," with or instead of the word "stranding." We suppose this word to be the same with "bulge," and to mean that part of a thing which swells or protrudes out.<sup>2</sup> We should say that the bilge of a ship was that part where her bottom rounds or swells out; and that she is "bilged," in nautical phrase, when by some injury this part is broken so as to let in water. We place in our notes the only case which touches this question; and more adjudication is necessary to determine certainly the meaning of this word.<sup>3</sup>

sels were usually placed when the water was drawn off. In taking ground the vessel struck on some piles which were not known to be there. This was held to be a stranding, because, said *Abbott*, C. J., "We cannot suppose that these canals are so constantly wanting repair as to make the drawing off the water an occurrence in the ordinary course of a voyage." *Rayner v. Godmond*, 5 B. & Ald. 225. And if a vessel is obliged to go into a tide harbor through necessity, as where she is driven in by a storm, this is so far out of the ordinary course that the underwriters are liable for all damage sustained by taking the ground at the ebbing of the tide. *Corcoran v. Gurney*, 1 Ellis & B. 456, 16 Eng. L. & Eq. 215. And in *Barrow v. Bell*, 4 B. & C. 736, 7 Dowl. & R. 244, where the vessel in entering the harbor struck against the fluke of an anchor which did not retard her progress but caused her to spring a leak,

and she was afterwards moored in deep water, but, being in danger of sinking, was warped into shoaler water where she took ground, it was held to be a stranding. See the next note.

<sup>1</sup> *Bowring v. Elmslie*, 7 T. R. 216, note; *Burnett v. Kensington*, 7 T. R. 210.

<sup>2</sup> *Worcester* and *Webster* both give "bilge" and "bulge" as synonymous terms. And in *Burnet v. Kensington*, 7 T. R. 210, it was averred that the vessel was "stranded, *bulged*, and destroyed" by the perils of the sea.

<sup>3</sup> In *Ellery v. Merchants' Ins. Co.*, 3 Pick. 46, it was held that there must be a breach in the vessel to constitute a "bilging," and that it was not enough that the vessel was thrown on her beam ends, and that the seams opened and water entered; but it was not decided in what part of the hull the breach must be.

*C. Of the Clause limiting the Liability of the Insurers to a certain Amount.*

It is not uncommon for policies, both in England and in this country, to contain a further clause, — which is also considered as a part of the memorandum, — that the articles therein enumerated shall be “free from average under five per cent,” or some other limitation.

The purpose of this is similar to that of the provision about stranding; it is that the insurers shall not be called on for such small losses as may very probably have arisen from the natural deterioration of perishable articles. It is also a frequent provision, that the insurer shall not be liable for a loss on any property insured, unless that loss amounts to a certain percentage. This applies to all property, memorandum or other, and the purpose is to protect the insurers from frivolous demands, and from claims for loss arising more from wear and tear than from perils insured against.

Among the questions which have arisen under these provisions, the most important is, whether successive losses may be added together to make up the required percentage. And the weight, both of reason and authority, would lead to the conclusion that successive losses may be so added, and that the insurers are liable if the aggregate equals the five or other per cent required. A distinction in this respect may exist between the ship and the cargo, because it is said that the damage done to the ship at different times may be more easily discriminated than the damage to the cargo, which can only be discovered at the end of the voyage.<sup>1</sup>

<sup>1</sup> In *Blackett v. Royal Exch. Ass. Co.*, 2 Crompt. & J. 244, 2 Tyrw. 266, where insurance was effected on a ship free from average under 3*l.* per cent, it was held that the underwriters were liable if the several partial losses, each under 3*l.* per cent, in the aggregate amounted to more. This decision was given on the ground that, in the absence of usage or authority to the point, the rule that exceptions must be taken most strongly

against the persons for whose benefit they are introduced should govern. In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, decided four years previous, it was held, that in regard to the ship distinct and successive losses were not to be added together, unless they happened at one time or in one continuous gale or storm. The court said it might “be otherwise in regard to the cargo, because the actual damage received at

If insurance is effected on freight by a policy containing the clause that the underwriters shall not be liable for any partial loss on goods perishable in their nature, unless it amounts to seven per cent, nor for any partial loss on other goods, or on the vessel, *or freight*, unless it amounts to five per cent, it would seem that the insurers on freight, even on perishable goods, would be liable for a partial loss on freight exceeding five per cent, by a general ship, and on a cargo consisting of various articles, some perishable and others not.<sup>1</sup>

If different articles are insured in the same policy under one valuation, free from average under a certain per cent, it has been held there must be a loss equal to the percentage on the whole valuation; but if the articles are separately valued, a loss on one equal to the specified percentage on its value renders the insurers liable.<sup>2</sup> It has been held in a recent case, where the memorandum

different times cannot be ascertained during the passage, or when it happens, but only when the cargo was unladed." In *Donnell v. Columbian Ins. Co.*, 2 Sumner, 366, it was stipulated that the underwriters should not be liable "for any partial loss on other goods, or on the vessel and freight, unless it amount to five per cent, exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss." The court held that the words "in each case" referred to the three subjects insured, and required a damage of five per cent, to justify a claim in case, and that they did not mean "at each time of loss." In respect to the cargo, Mr. Justice *Story* held, that the successive losses in the course of the voyage were to be added together. He also was of the opinion that the same rule applied to the ship, though the point was not decided.

<sup>1</sup> *Lord v. Neptune Ins. Co.*, 10 Gray, 116.

<sup>2</sup> *Ocean Ins. Co. v. Carrington*, 3 Conn. 357. The question in this case arose in a suit on a premium note. The

defendant refused to accept the policy and pay the note, on the ground that the policy was not made out in accordance with his order, which was as follows:—

"On 26 horses valued at \$2,200 at 15 per cent,	\$450
and 20 oxen " " 800 policy	1
	<hr/>
	\$ 3,000
	<hr/>
	\$ 451."

A policy was made out for \$ 3,000 on stock, etc. The court were divided on the question whether the above order meant that the valuation should be separate, three judges being in favor of the proposition and two opposed to it, but no doubt was expressed as to the effect of it. But in *Louisville M. & F. Ins. Co. v. Bland*, 9 Dana, 143, this rule was not adopted, but it was held, that, in every case where there are several classes of goods, the value of the article lost is not to be compared with the value of the whole cargo, nor of the class, but of the species alone. Under this rule, if tin plates and sheet-iron are warranted free from average unless general, and hardware and brass wire free from average under fifteen per

clause provided that the insurers should not be liable for any partial loss on the perishable goods enumerated, "unless it amounts to seven per cent on the whole aggregate value of such articles, and happens by stranding," that the insurers were liable as for a total loss on any one kind of those articles, which, in consequence of perils insured against, is of no value at its arrival at the port of destination, and is thrown away, although other kinds are only partially injured before arrival.<sup>1</sup>

A similar question arises when a cargo, consisting of bales, packages, or parcels of the same kind of goods, is insured against total loss only, or free from average under a certain per cent. In England the law seems to be that if the packages are separately valued, the insured can recover for all that are totally lost, but not otherwise.<sup>2</sup> It has been said that the rule is the same in this

cent, the underwriters are liable for a loss of the brass wire, equal to or exceeding fifteen per cent of its value.

<sup>1</sup> *S. Howay v. Nept. Ins. Co.*, 12 Gray, 73.

<sup>2</sup> *Ralli v. Janson*, 6 Ellis & B. 422, 36 Eng. L. & Eq. 198. In this case a number of bags of linseed, valued at a gross sum, were insured at and from Calcutta to London. Each bag was of the same size, and contained the same quantity of seed. On the voyage, a number of bags were thrown overboard, and others were utterly destroyed by perils of the sea. Held, that, there being no separate valuation, or any other stipulation in the policy showing that it was intended to make a separate insurance upon each portion, the policy was on the whole of the seed, and the underwriters were not liable for a loss of part. This case has changed the rule as laid down by Mr. *Arnould*, 2 *Arnould*, Ins. 1038, which has been generally supposed to be the law in England. Mr. *Arnould* says: "It is an undoubted doctrine in the English law of marine insurance, that, if a cargo of perishable goods be made up of several distinct packages,

each capable of a separate valuation, and one or more of these be entirely lost, there is an absolute total loss upon every such package, though the rest of the cargo may come to hand only partially damaged, and the whole may have consisted of articles warranted free from average." This doctrine was founded on the case of *Davy v. Milford*, 15 East, 559, and has been recognized in numerous cases. *Lewis v. Rucker*, 2 Burr. 1167; *Hills v. London Ass. Co.*, 5 M. & W. 569; *Hedbergh v. Pearson*, Holt, N. P. 349, 2 Marsh. 432, 7 Taunt. 154; *Cologan v. London Ass. Co.*, 5 M. & S. 447; *Thompson v. Royal Exch. Ass. Co.*, 16 East, 214. Some of these cases have engrafted exceptions on the rule as stated by Mr. *Arnould*, but we do not propose to consider them, as the whole subject is so learnedly discussed in *Ralli v. Janson*. In a recent case, however, it has been held that the doctrine in *Ralli v. Janson* applies only where the cargo is composed of the same kind of goods, and that where they are different, and a part is lost, this may be recovered, although the articles are not separately valued. *Duff v. Mackenzie*,

country,<sup>1</sup> but we are not aware of any decision to that effect, and the point has been decided otherwise in Pennsylvania.<sup>2</sup>

Some questions have arisen as to the way in which such an average should be adjusted, but they must rest on the same principles which are applicable to the case of an adjustment under the fifty-per-cent rule, and we will for the sake of convenience consider them together hereafter.

3 C. B. N. S. 16 ; *Wilkinson v. Hyde*, 3 C. B. N. S. 30. Goods described as the "master's effects" were insured free from average, and, many of the articles being lost, this action was brought for compensation, and the court held it could be maintained.

If an open policy is made on goods to be declared, it has been held that the insured cannot by a separate valuation of each package or bag in the indorsement create a separate insurance on each package or bag. *Entwisle v. Ellis*, 2 H. & N. 549.

<sup>1</sup> In *Kettell v. Alliance Ins. Co.*, Sup. Jud. Ct., Mass., March T. 1858, *Shaw*, C. J., speaking of the rule which allows a recovery for a total loss of part, said : "It is admissible only, we think, when goods of the same kind are separately invoiced and insured, or when insurance is made specifically upon bales, boxes, or other packages, valued and insured by the bale or package, or number of packages in parcels less than the whole."

<sup>2</sup> *Newlin v. Ins. Co.*, 20 Penn. State, 312. In this case insurance was effected on one hundred and four bales of cotton, valued at fifty dollars per bale. There

was a clause in the policy exempting the underwriters from partial loss under five per cent. Four bales were lost by the perils of the sea, and the insured claimed to recover, on the ground that, each bale being separately valued, the contract was to be considered as an insurance on each bale ; but the court held that the defendants were not liable.

Whatever the law may be where each parcel is separately valued, it is certain in this country, that, where this is not the case, there can be no total loss of part. *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415 ; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33 ; *Moreau v. United States Ins. Co.*, 1 Wheat. 219 ; *Humphreys v. Union Ins. Co.*, 3 Mason, 429 ; *Waln v. Thompson*, 9 S. & R. 115. In *Brooke v. Louisiana State Ins. Co.*, 16 Mart. La. 640, the court held, that where a number of mules were insured against total loss only, and some were lost, the insured could recover for these ; but after a most able argument on a rehearing, 16 Mart. La. 681, they reversed their decision, in order to conform to the current of American cases. 17 Mart. La. 530.







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